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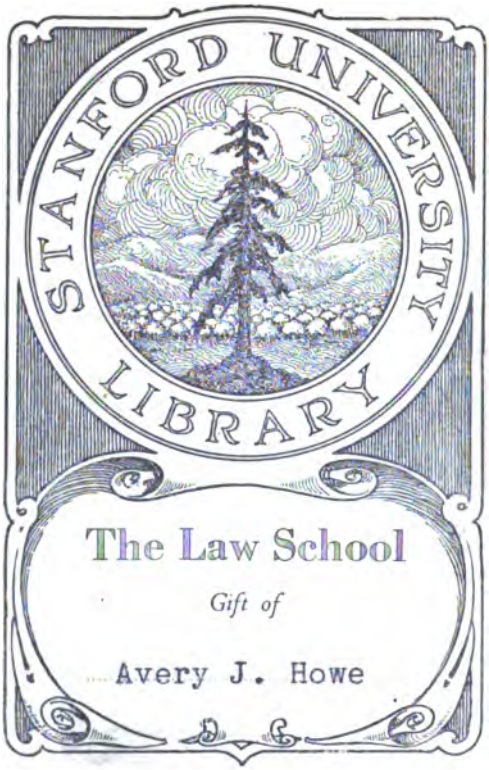
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PREPARED BY

JUDGES, MEMBERS OF THE BAR, TEACHERS IN LAW SCHOOLS, AND WRITERS ON LEGAL SUBJECTS

UNDER THE EDITORIAL SUPERVISION OF

EUGENE ALLEN GILMORE, A. B., LL. B.
PROFESSOR OF LAW, UNIVERSITY OF WISCONSIN

ASSISTED BY

WILLIAM CHARLES WERMUTH, M. S., LL. B.
LAW LECTURER, NORTHWESTERN UNIVERSITY

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BY

HENRY WINTHROP BALLANTINE, A.B., LL.B.,

PROFESSOR OF LAW, UNIVERSITY OF WISCONSIN

LAW OF LIENS AND PLEDGES

BY

ROBERT LLEWELLYN HENRY, JR., J.D., B.C.L.,

DEAN OF COLLEGE OF LAW, UNIVERSITY OF NORTH DAKOTA

LAW OF AGENCY

BY

WILLIAM A. FERGUSON, A.M., LL.B.,

LAW LECTURER, FORDHAM UNIVERSITY

LAW OF SALES OF PERSONAL PROPERTY

BY

H. CLAUDE HORACK, PH.B., LL.B.,

PROFESSOR OF LAW, STATE UNIVERSITY OF IOWA

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PREFACE.

The treatises in the fourth volume of Modern American Law deal with the legal principles involved in many business transactions, concerning those alike of the small tradesman and the manager of "big business."

The first commentary in the volume is "Personal Property and Bailments" by Professor Henry Winthrop Ballantine, A.B., LL.B., of the University of Wisconsin. Professor Ballantine defines personalty and discusses the principles underlying the question of who may possess an interest in personal property. In the chapters on bailments, Professor Ballantine further treats of the temporary possession of personal property assumed by public carriers, innkeepers, and other bailors. This fundamental and somewhat complicated branch of the law is clearly interpreted and simplified by Professor Ballantine.

"Law of Liens and Pledges," the second treatise in this volume, is by Dean Robert L. Henry, Jr., Ph.B., J.D., B.C.L., of the University of North Dakota. Dean Henry presents a clear outline of this practical subject, and deals with all the important

topics suggested by his title, particularly the difficult question of creditors' rights.

The third commentary in the volume, "Law of Agency," has been prepared by Professor William A. Ferguson, A.M., LL.B., of Fordham University. Professor Ferguson analyzes this very important commercial subject, indicating carefully the relationship of principal and agent. He also details their reciprocal rights and duties. The equally important problems arising as to the respective relationships of principal and agent to third parties are also explained.

The principles underlying the transaction of buying and selling, as well as the transfer of title to personal property, are set forth by Professor H. Claude Horack, Ph.B., LL.B., of the State University of Iowa. His work on the "Law of Sales of Personal Property" forms the concluding treatise in the volume.

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PERSONAL PROPERTY AND BAILMENTS

BY

HENRY WINTHROP BALLANTINE, A.B., LL.B.*

PART I

ACQUISITION OF PERSONAL PROPERTY

CHAPTER I.

WHAT IS PERSONAL PROPERTY.

1. **Scope of property law.**—Much of the law relating to property is included by the common law under torts. Questions as to actions and remedies for the infringements of rights of property, and the recovery of possession or of damages from the wrongdoer, are largely treated under torts, damages, and other heads. To the law of property, however, are assigned questions as to (1) the source and origin of title, the methods of acquisition and transfer of property rights; and (2) the various

* Professor of Law, University of Wisconsin Law School; sometime Dean and Professor of Law, University of Montana Law School; formerly of the San Francisco Bar; Assistant Professor of Law, Hastings College of Law, and Lecturer in Law, University of California. Author of various articles in legal encyclopedias and contributor to law journals.

modifications of absolute ownership, and the rights, interests, and liabilities of the respective parties when the use and possession of an object are separated from the title or ownership, as in the case of bailments.

2. **Distinction between real and personal property.**—Property is often conceived of concretely as a thing or object over which ownership is exercised; but strictly, it is the privilege or right which one has in respect to a thing or object to own, possess, use, or dispose of it to the exclusion of others. The civil law of Europe adopts a logical classification of the objects of property rights, and one existing in the nature of things, viz.: into Movables and Immovables. The common law of England also distributes the objects of property rights into two great classes, viz.: Things Real and Things Personal. In the main, the English division into real and personal is between land and goods. Land includes the soil, and those objects which are growing upon it, or annexed to the soil in such a way as to be deemed a part of it, such as grass, trees, minerals, fences, and buildings.

Whether things that are attached to the soil are chattels or not must often depend upon circumstances, and this is considered elsewhere under the head of Fixtures.

Every kind of property that is not real is personal; such are cattle, jewels, money, claims, and privileges. A thing once movable may be affixed to the soil and incorporated with it so as to become subject to the law of real property, e. g., bricks, mortar, and build-

ing stone built into a house. By severance from the soil, trees, coal, jewels, minerals, metals, oil, and gas become personal property.

Real property, as commonly understood, includes all rights and interests in respect to land, except leaseholds and liens. Leases of land for a term of years, though they be for a term of a thousand years, are classed with personal property as Chattels Real; so, liens upon land resulting from mortgages are personal property.

Vegetable growths. Vegetable growths and products have been classified as *fructus naturales* and *fructus industriales.* Fructus naturales are those which grow spontaneously, such as trees, bushes, and grasses, which are regarded as part of the land. Fructus industriales are those which are the result of annual planting, labor, and cultivation, such as grains, vegetables, and other annual crops which are regarded as personalty.[1]

As a matter of fact, the authorities are not in harmony on the question whether oranges, peaches, and other orchard fruit growing upon trees are realty or personalty. Such fruit is not the result of annual planting, but because the crop is picked annually, and labor is usually required, it is often classed with fructus industriales as personal property.[2]

3. **Divergence in the law of real and personal property.**—The divergence in the common law re-

[1] Williston, Sales, § 61.

[2] Simmons v. Williford, 60 Fla. 359, 53 So. Rep. 452, Ann. Cas. 1912 C., p. 735, 736, note.

lating to real and personal property is vastly wider than in the civil law between movables and immovables, for example, as to succession on death, the formalities of transfer and the remedies for the recovery thereof. This cannot be explained by any intelligible distinction in the subject matter for the most part, but only by the history of the law and the fact that the holding of land had, under the feudal system, a political object.

On the other hand, chattels, or things personal, were never the subject of feudal tenure, and the rules of law as to personal property have been largely drawn from reason and commercial convenience, which have been slow to influence the law of land,—a branch of law which still shows the scars and ancient technicalities of feudal policy. The modern and liberal law of personal property has, however, in certain respects, assimilated to itself the feudalized law of land, particularly as to the rules governing succession on the death of the owner and the administration of his estate. The law of leases for years, which are in the nature of contracts, and which are classed as personal property, has, nevertheless, grown up under the shadow of the law of real property, and has preserved to the present day many ancient technicalities.

4. **Corporeal and incorporeal property.**—Property may be corporeal or incorporeal according as the object of the right is material, tangible, and subject to possession, or intangible and abstract. Incorporeal personal property consists of certain valuable privileges such as patents or copyrights; and

of claims against persons or corporations such as debts, bonds, stock, bank deposits, et cetera, which are referred to as choses in action. Choses in action were regarded by the common law as things in possibility, recoverable by suit, and not yet reduced to possession. Where evidenced by a note, certificate of stock, or other document, the paper is a chose in possession, but the right evidenced thereby is incorporeal, a chose in action.

CHAPTER II.

TITLE BY OCCUPANCY.

5. **Modes of acquiring title.**—We may now proceed to consider the various modes in which title to personal property may be acquired and lost. Titles may be classified as being either by original or derivative acquisition. Original or independent acquisition is either (1) by occupancy, where a thing is appropriated which has no present owner, as in the case of the capture of wild animals; or (2) where the thing was owned, but the acquisition is independent, not under the former owner, as in the case of title by adverse possession; or (3) title by labor and production, as where a thing is newly created or produced by mental labor, as in the case of literary productions, or is the result of physical labor and materials, as in the case of accession and confusion.

Derivative titles. Such titles are either (1) by voluntary transfer by act of the former owner, as in the ordinary cases of gift and sale; or (2) where the title is derived from the former owner, but without his consent, as in the case of execution sale, bankruptcy or eminent domain, where title is said to be transferred by operation of law; and (3) where title is derived by succession on death of the former owner, either testate or intestate.

6. **Occupancy—Pursuit and capture of wild animals.**—Occupancy, as a source of title, is the appropriation and taking possession of those things which before belonged to no one,—such as wild animals, fishes, wild fowl and things thrown away or abandoned. Every individual has the right to pursue and take any beast, bird, fish, insect, reptile or other wild animal, except so far as he is restrained by private property in the soil or by game laws. Fish caught in a net from which they might possibly escape are, while actually confined, sufficiently captured to be property, and one stealing them is guilty of larceny.[3] However, in order to acquire title recognized by the law, substantial control or possession must be obtained; as where the animal is mortally wounded or disabled, or ensnared in a trap so that it may not escape at will; mere pursuit alone vests no title or property in animals *ferae naturae* (naturally wild). In the case of Young v. Hichens,[4] plaintiff had drawn his net partly around a school of fish, leaving a space of about six or seven fathoms between the ends of the net which he was about to enclose. At this point was stationed a boat to frighten the fish from escaping. Defendant rowed his boat up to this opening and threw his nets within plaintiff's nets, frightening the fish and preventing plaintiff from taking them, as he could otherwise have done. Plaintiff sued in an action of trespass which lies only for an interference with possession. Defendant set up the plea that the fish were not the plaintiff's fish and

[3] State v. Shaw, 67 Ohio St. 157, 65 N. E. Rep. 875, 60 L. R. A. 481, note.

[4] (1884) 6 Q. B. 606, 51 E. C. L. 606 (Eng.), 1 Gray, Cases on Property (2nd ed.), p. 17.

that he was not in possession of them. The court held for the defendant, although the plaintiff would have got possession but for the defendant's interference. The court intimated that the plaintiff might have succeeded if he had sued in the proper "form" or theory of action as for a wrongful and malicious interference with his business and his right to acquire property. In the case of Keeble v. Hickeringill,[5] Lord Holt sustained an action of trespass on the case for damages for frightening away ducks which plaintiff had decoyed to his pond and was about to shoot; but the action of trespass lies only for an injury to possession and plaintiff was not disturbed in his possession, but only in his chance to take possession.

Another illustration of the rule that mere pursuit gives no title until the pursuer has gained actual power over the quarry is the case of Buster v. Newkirk.[6] In that case, plaintiff had wounded a deer. He pursued the deer with his dogs until night, occasionally discovering blood. As night came on he abandoned pursuit, but the next morning resumed the chase until he came to defendant's house, where the deer had been killed the evening before by the defendant while the plaintiff's dogs were still in pursuit. One of the plaintiff's dogs laid hold of the deer at the same moment that defendant cut its throat after it had fallen exhausted. Plaintiff sued defendant in an action of trover for the value of the deer, but it was held for defendant, as the deer was

[5] (1706) 11 Q. B., East 574, note (Eng.).
[6] 20 Johns. 75 (N. Y.), 1 Gray, Cases on Property (2nd ed.), p. 19.

not sufficiently in the power or control of plaintiff to give him a property in the animal. Possibly fresh pursuit with reasonable prospect of success would give the pursuer at least a prior right to acquire property in the animal.[7]

7. **Title defeasible by escape.**—Wild animals killed belong absolutely to the killer, if he be not a trespasser.[8] In the case of wild animals confined alive, title is not absolutely vested in the captor, but is qualified or defeasible, and if they escape and are found at large in their native wildness, they are free and open to the first taker. There is a case reported where a sea-lion escaped in New York, swam down the coast of New Jersey and was captured two weeks later by a fisherman, 70 miles from the place of its escape. It was held that the animal had returned to its native state and the title was in the man who captured it, although the former owner still hoped to regain it.[9] According to Blackstone, close pursuit of a swarm of bees which flies out of one's hive is sufficient to continue a previous state of captivity, although mere pursuit vests no new title; no one else is entitled to take them so long as one keeps them in sight and has power to pursue them. Bees, rabbits, doves, or other wild animals which are so tame as habitually to return to their owner are said to have the *animus revertendi* (the intention of returning), and though they stray at large, are not regarded as having escaped.

[7] Am. & Eng. Encyclopedia Law and Procedure, vol. 3, p. 956.

[8] Amory v. Flyn, 10 Johns. 102 (N. Y.), 6 Am. Dec. 316.

[9] Compare Mullet v. Bradley, 53 N. Y. Suppl. 781, 12 Harvard Law Review 346.

8. **Trespasser and landowner.**—Ownership of the soil imposes an important restraint upon acquiring title by occupancy, in that trespassers can acquire no property in animals killed as against the owner of the soil, who has the exclusive privilege of hunting or fishing on his land to the exclusion of all other persons and may restrain any stranger from taking wild animals upon his land.[10] If, however, the owner or possessor of the land licenses hunting or fishing, or makes no objection thereto, no one else has a better claim to wild animals taken than the first occupant. Such implied permission to trap, hunt and fish is tacitly given upon the public domain of the states and of the United States, or on private land in wild and unsettled mountain and forest regions.

It has been suggested that if a man starts game within his own grounds and follows it into another's and kills it there, he acquires title against him on whose ground it was killed, but this seems very doubtful. A closer case would arise where a trespasser starts game on another's private grounds and pursues it upon his own, as to whether his title would be vitiated or not by its inception in the trespass on the ground where the game was started.

9. **As between trespassers.**—It would seem on principle that only the landowner could question the title to game or wild animals taken on his land, but the decisions seem to be otherwise. In Rexroth v. Coon,[11] the plaintiff placed a small pine box, or bee-hive, in the crotch of a tree in the woods on the

[10] Blades v. Higgs, 11 H. L. Cas. 621 (Eng.).

[11] 15 R. I. 35, 23 Atl. Rep. 37, 5 Harvard Law Review 404.

land of G. Plaintiff visited the hive about twice a year to ascertain whether any bees had hived in the box. About September 1, 1883, two years and a half later, defendant went on the premises and packed and carried away the hive together with the swarm of bees within it, and also the honey and honey-comb, and appropriated them to his own use. Neither the plaintiff nor defendant had any permission or license from the owner of the land to place or keep the hive in the tree, or to enter on the land for any purpose. After defendant had removed the contents, he replaced the hive in the tree. Plaintiff sues for compensation for the hive and its contents, and the question is whether he acquired any property in the bees by hiving them, notwithstanding they were on the land of another. The court held for the defendant on the ground that a trespasser on land cannot acquire title to animals *ferae naturae,* but cited authorities which discussed the question only as between a trespasser and the landowner, and not as between two trespassers.[12]

10. **Game laws.**—Property in wild animals is in the people of the state, at least so far as to be subject to governmental authority and regulation.[13] It is an interesting question whether one can acquire title to game taken or killed in violation of the game laws of the state, and whether his title is vitiated by his illegal act. In a Maine case,[14] plaintiff cap-

[12] For a note on property in bees see State v. Repp, 104 Ia. 305, 73 N. W. 829, 40 L. R. A. 687, note.

[13] Geer v. Conn., 161 U. S. 519, 40 L. Ed. 793, LEADING ILLUSTRATIVE CASES.

[14] James v. Wood, 82 Me. 173, 19 Atl. Rep. 160, 8 L. R. A. 448.

tured a moose and purchased a deer during the closed season. Defendant entered on plaintiff's land and liberated the animals. Plaintiff sues for their value, and one of the defenses set up is that his possession was unlawful and therefore he had no title even against a mere wrongdoer. It was held in the first place that defendant did not justify his act in taking the deer from the plaintiff's possession, for possession is sufficient evidence of title until impeached. Although the deer was purchased during the closed season, the evidence failed to show that it had been captured in violation of law. As to the moose, the plaintiff's illegal capture of it alive prevented the animal from becoming property at all. When game is killed, it becomes property absolutely, said the court, but when taken alive, it is only conditionally so. The possession of live game was illegal, and releasing it interfered with no legal right, and plaintiff was entitled to recover no damages for its being set loose. The court, however, fails to explain how it reconciles its decision with the principle that one cannot justify the taking of a chattel, or land, to which he has no title, by showing that the person from whom he took it is not the owner. Possession of property is a good title against everybody but the true owner.[15] Even a thief who steals a coat may sue one who takes it from him, if not the true owner.

[15] Fiske v. Small, 25 Me. 453.

CHAPTER III.

TITLE BY FINDING.

11. **Abandoned chattels.**—Chattels lost may be picked up by the finder, but it is only those things which have been actually abandoned by the former owner that are open to occupancy. In order to vest in the finder absolute right to the property, it must appear from evidence, direct or circumstantial, that the owner has voluntarily and wholly abandoned it, intending not to reclaim it.[16]

12. **Lost chattels.**—One who first finds and appropriates a lost chattel, even though not abandoned, becomes entitled to possession against all the world except the true owner. There still remains a paramount claimant, the loser, who may reclaim the property from the finder. His title remains unaffected by the mere accident that the chattel has been lost, even though sunk to the bottom of a lake or sea; as to the loser, the finder is a mere depositary or bailee, who cannot use the chattel and who must not only restore it, but often by a statute must cause it to be appraised and advertised. If the finder takes possession dishonestly and misappropriates it *animo furandi,* it is larceny.[17] Before a complete title accrues to the finder it is necessary that the true

[16] Kuykendall v. Fisher, 61 W. Va. 87, 56 S. E. 48, 8 L. R. A. (N. S.) 94, 97, 103.

[17] People v. Hoban, 240 Ill. 303, 88 N. E. 806, 22 L. R. A. (N. S.) 1133, note.

owner should have relinquished or lost his right to possession.

In the famous case of Armory v. Delamirie,[18] the general right of the finder of any article as against all the world except the true owner, or prior possessor, was established, and it has never since been disputed. In that case, a youthful chimney-sweep was so fortunate as to find a very valuable jewel which he took to a jeweler to ascertain its value. The jeweler attempted to take advantage of the boy and told him the stone was worthless, and offered him a few pence for it, which the lad declined and demanded the stone back again. The jeweler refused to return the stone, but gave back the socket. It was held that nobody but the real owner had a better title than the finder. Possession is nine points of the law, as a popular adage has it. The same principle applies also in the case of land, and possession is a good holding title as against all the world until a better is shown. A finder who has himself lost his find can bring trover against a second finder.[19]

13. **Finder's title as affected by ownership of the soil.**—A trespasser cannot acquire any right to possession as finder against the owner of the soil.[20] Even if one is rightfully on land of another, the owner of the place of discovery may have a superior title, particularly where the chattel is found buried in or attached to the soil. Thus where one while

[18] (1722) 1 Str. 505 (Eng.).

[19] Clark v. Maloney, (1840) 3 Harr. 68 (Del.), 1 Gray, Cases on Property (2nd ed.), p. 297.

[20] Barker v. Bates, 30 Mass. 255, 1 Gray, Cases on Property (2nd ed.), p. 295.

cleaning out a pool of water on another's land found two gold rings in the mud at the bottom of the pool, it was held that the possessor of the land was entitled to the chattels as against the finder. The landowner's general power to control, his intent to exclude unauthorized interference, carries with it a possession of everything attached to or under the land, even if as possessor he has no knowledge or intent directed to the specific thing.[21] So in another case where a prehistoric boat was discovered by the lessees of land, in the course of excavating for the foundations of a gas works, imbedded in the soil six feet below the surface, having been abandoned or left derelict by its original owners on the bank of the river some two hundred or more years before, and become by the operation of natural causes buried in the earth; it was held that the owners of the land had lawful possession good against all the world and did not lose this by the mere finding; even if the wood had not become petrified or fossilized, but retained the properties of wood, yet as a chattel it belonged to the landowner, though he was ignorant of its existence.[22] An aerolite or meteorite becomes part of the soil upon which it falls out of space and is the property of the owner of the land as against one who finds and removes it.[23]

The case of Ferguson v. Ray[24] denies that the finder has any title as against the owner of the soil to gold ore placed in a bag near marked trees and

[21] South S. Water Co. v. Sharman, (1896) 2 Q. B. 44 (Eng.).
[22] Elwes v. Briggs Gas Co., 33 Ch. Div. 562 (Eng.).
[23] Goddard v. Winchell, 86 Ia. 71, 52 N. W. 1124, 17 L. R. A. 728.
[24] 44 Ore. 557, 77 Pac. 600, 1 L. R. A. (N. S.) 477, note.

found long afterward hidden in the earth. But the same court, in the case of Danielson v. Roberts,[25] held that the finders were entitled to gold coin found in rust-eaten tin cans and partially decayed sacks where they had been hidden under dirt and debris in an old hen house, even as against the owner of the soil. The distinction between these two cases is not obvious, but is explained in the later Oregon case of Roberson v. Ellis,[26] as being based on the nature of gold coin as Treasure Trove. It seems that in the case of treasure trove, which includes gold coin and gold bullion, but not gold ore, the place of finding is immaterial, and the owner of the soil in which treasure trove is found acquires no title to it by virtue of his ownership of the land.[27] It is believed that there is no basis in the common law authorities for this application of the distinction between treasure trove and other classes of lost property, and that the English common law doctrine as to treasure trove has been merged in this country into the general law respecting the finding of lost property.

14. **Property mislaid.**—If a thing is voluntarily laid down on a chair or counter and forgotten in a shop, bank, car or house, the proper custodian of chattels so mislaid is the owner of the place where the thing has been left, rather than someone who happens to have discovered it. Thus where a pocketbook was left upon a barber's table, it was held that the proprietor had a better right to possession than

[25] 44 Ore. 108, 74 Pac. 913, 65 L. R. A. 526.

[26] 58 Ore. 219, 114 Pac. 100, 35 L. R. A. (N. S.) 979.

[27] See also Weeks v. Hackett, 104 Me. 264, 71 Atl. 858, 19 L. R. A. (N. S.) 1201, LEADING ILLUSTRATIVE CASES.

the finder.[28] So where a pocketbook was left on a desk intended for the use of customers in a bank outside the teller's counter, the bank was held entitled to custody as against all persons except the true owner.[29] But where a pocketbook was dropped on the floor of a shop by a customer and picked up by another customer before the shopkeeper knew of it, there the property, having been dropped in a public part of the shop, was never in the possession of the shopkeeper nor under the protection of his house.[30] So where a pocketbook is found by a servant in the parlor of a hotel, the servant is entitled as against the proprietor, although it might be otherwise, if found in a private room.[31]

15. **Finding in the receptacle of another.**—By the civil law, where anything has been hidden for so long that its owner cannot be found, the title to one-half is acquired by the finder, and to the other half by the owner of the thing within which the secreted object was found; only one-half of a thing discovered and dug out of the earth belongs to the owner of the land; likewise by the civil law one-half of the thing found in a cupboard or a safe belongs to the owner of the receptacle; while by the common law one finding something in a safe belonging to another, would be entitled to keep the chattel as against the owner of the receptacle. On the other hand the owner of the soil is preferred to the actual discoverer of lost chattels except buried treasure. In

[28] McAvoy v. Medina, 11 Allen 548 (Mass.), 87 Am. Dec. 733.
[29] Kincaid v. Eaton, 98 Mass. 139.
[30] Bridges v. Hawkesworth, 21 L. J. Q. B. 75 (Eng.).
[31] Hamaker v. Blanchard, 90 Pa. 377.

Durfee v. Jones,[32] the plaintiff bought an old safe and then, wishing to sell it again, sent it to the defendant and gave him leave to keep his books in it until sold. The defendant found $165.00 in bank notes stuck in a crevice of the safe between the exterior and the lining. When this came to the plaintiff's ears, he demanded the safe and the money. Defendant sent back the safe, but refused to give up the money. Plaintiff sued, claiming that as owner of the safe, he was entitled to the money by right of prior possession. But it was held that the defendant as finder of the money was entitled to retain it as against the plaintiff, and against all the world except the real owner. The place of finding was immaterial. So where bank notes were found by an employee among some old papers, he was held entitled as against his employer.[33]

16. **Limitations on occupancy by royal privilege.** —Vacant goods casually thrown open to occupancy by loss and abandonment, if they belonged to certain classes, were vested by a special privilege at common law in the king:

(1) Such were *waifs* or stolen goods scattered or waived by a thief in his flight; here the king by substitution became the robber of the goods for which his subject, perhaps, had swung.

(2) *Wrecks,* goods or fragments of shattered vessels cast by the sea upon the shore between high and low water mark were also given by special privilege to the crown. Here there was recognized a

[32] 11 R. I. 588, 23 Am. Rep. 528.
[33] Bowen v. Sullivan, 62 Ind. 281, 30 Am. St. Rep. 172.

constructive or forced abandonment in a year and a day, provided no man, dog or cat escaped alive ashore as something to identify the property; and provided also that no owner appeared to establish claim within a year from the seizure of the property.[34]

(3) *Flotsam, jetsam and ligan,* goods adrift by some marine disaster where the owner was unknown, as well as all wreckage cast on the shore, belonged to the crown. A *derelict* in England went to the Lord of the Admiralty, who recompensed the finder by the payment of liberal salvage.

(4) *Treasure trove* is gold or silver coin, plate or bullion found concealed in the earth or in the roof, walls, or other part of a building or ruins, the owner being unknown. By early common law the finder took title against all the world except the true owner; but by statute title was vested in the king subject to the claim of the true owner. It has been noted that in the United States the common law doctrine relating to treasure trove has generally been merged into the law relating to the finding of lost property.[35]

(5) *Estrays or wandering animals* were the fifth class to which the ordinary law of finding did not extend, the law investing the privilege of the finder in the monarch, or lord to whom he granted it. The modern policy in such cases is expressed by estray statutes as to taking up animals roaming at large

[34] Murphy v. Dunham, (1889) 38 Fed. 503.

[35] Weeks v. Hackett, 104 Me. 264, 71 Atl. 858, 19 L. R. A. (N. S.) 1201, LEADING ILLUSTRATIVE CASES; and cases cited, 10 A. & E. Ann. Cas. 1156, 129 Am. St. Rep. 390.

without sufficient food or shelter. These usually require the finder to hold the animals on behalf of the true owner who may reclaim them within a certain time on payment of a fair remuneration to the finder for his services, but after such time, the animal may be sold.[36]

[36] Havird v. Lung, 19 Ida. 790, 115 Pac. 930; Am. & Eng. Encyclopedia Law and Procedure, vol. 3, p. 1030.

CHAPTER IV.

ACQUISITION OF TITLE BY ADVERSE POSSESSION UNDER STATUTE OF LIMITATIONS.

17. **Title by adverse possession.**—In certain classes of cases, title is acquired to chattels which had another owner, although title and possession are not acquired under him or by his consent. The fisherman who catches fish out of the sea, or the sportsman who bags a bird, is at once absolute owner. He has possession with the unqualified right of possession, since there is no one in the world who can rightfully interfere with him. But a faulty possession may ripen into a full and complete legal title, and the wrongdoer will become absolute owner when the former owner's remedies are barred and there is no longer anyone who can legally dispute his possession.[37] What is the effect upon the title when A, who has stolen or converted B's property, holds adverse possession of it until the Statute of Limitations has barred B's remedy for recovering possession? Is B still the owner or entitled to retake possession without suit? It is held not. If he cannot replevy he cannot take with his own hand. The wrongdoer acquires a title superior to that of the former owner, whose neglect to avail himself of his legal remedies destroys his title.[38]

[37] Ames, Disseisin of Chattels, 3 Harvard Law Review, pp. 23, 313, 327

[38] Campbell v. Holt, 115 U. S. 620, 6 Sup. Ct. 209; Chapin v. Freeland, 142 Mass. 383, 8 N. E. 128.

Justice of this title. Title by adverse possession apparently affords an instance of a right originating in a wrong; and yet, in reality, this doctrine is necessary to the perfection of just titles. This doctrine is intended for the repose of society, quieting title automatically by lapse of time. It is not intended to give advantage to fraud or wrong, but to avoid uncertainty in the holding of property, giving security to all proprietors and enabling purchasers to rely on title so perfected. This policy is especially important in connection with real estate under our crude system of public records where many doubts and defects concerning the title arise and the difficulty of proving title is great. In the case of personal property, possession is the usual evidence of title, and here too continued possession under claim of right is made conclusive.

18. **Requisites of adverse possession.**—The policy to be subserved indicates the requisites of title by adverse possession. A thief, merely by avoiding detection and concealing property during the period for bringing actions for conversion, cannot acquire title to the property or immunity from suit for its proceeds. Possession must be under claim of right or title, and open, public and notorious.[39] Yet, even a thief could plead the Statute if he has held the property openly and notoriously in the community where the larceny occurred; not because of his merits, nor even because of the laches of the former owner, but in order that open possession may be evi-

[39] Lightfoot v. Davis, 198 N. Y. 261, 91 N. E. 582, 29 L. R. A. (N. S.) 119, LEADING ILLUSTRATIVE CASES.

dence of title;[40] and want of knowledge on the part of the owner does not affect the rule that the Statute begins to run as soon as the taking, if the possession is open and notorious.[41]

Possession to be deemed adverse must be under claim of title, or under color of title; otherwise there is nothing to be quieted. Mere possession, continued however long, unless it amounts to an open assertion or exercise of ownership, will not divest the owner of his property. Possession of land not under claim of title will be presumed to be in subordination to the true legal title.[42] The same rule is applied to personal property.[43]

19. **Tacking possessions.**—If A's property is converted and adversely held by B for a time and then passed from the wrongdoer B to a new possessor C by sale, may the times of the successive holders be tacked or counted together so as to make up the entire period of limitation? It is generally held in the case of land that after the Statute of Limitations has begun to run, each subsequent purchaser, even by a parol transfer, may tack on the prior adverse holding of his predecessor in order to complete the bar.[44] But if there is no privity between the adverse holders, and C takes the thing forcibly from B, it is very doubtful whether tacking would be allowed.[45] It would seem on theory, however, that there are now

[40] Shelby v. Shaner, 28 Okla. 605, 115 Pac. 785, 34 L. R. A. (N. S.) 621.
[41] Yore v. Murphy, 18 Mont. 342, 45 Pac. 217.
[42] Doherty v. Matsell, 119 N. Y. 646, 23 N. E. 994.
[43] See footnote 39, p. 22; Gatlin v. Vaut, 6 Ind. Terr. 254, 91 S. W. 38.
[44] Crawford v. Viking, etc., Co., 84 Kans. 203, 114 Pac. 240, 35 L. R. A. (N. S.) 498, note.
[45] Miller v. Dell, (C. A. 1891) 1 Gray, Cases on Property (2nd ed.), p. 39.

two defects in C's possessory title, namely, A's right to recover and also B's right as against C, and that the times of the successive adverse holders should be tacked together to make up the period of limitation as against A, even though B's right against C is not yet barred.[46] The adverse possession must, however, be continuous; for if B, after disseizing A, abandons the property, leaving possession vacant, and C subsequently finds it and assumes possession, here, in legal contemplation, A's possession revives in the meantime and C cannot tack previous holdings.

20. **Summary.**—We have thus seen that the true operation of the Statute of Limitations is not to confer title, or effect a conveyance from this or that owner. The possessor already has a title good against all intruders by his naked possession, and when the remedy of the true owner is barred, the possessory title is set free from all inconsistent or superior claims. The Statute thus operates to quiet and remove clouds from the title which the possessor already has. It in effect provides that after the open exercise of ownership for the requisite time, no one may disturb or question it.

[46] Ames, 3 Harvard Law Review, 323.

CHAPTER V.

TITLE BY SATISFACTION OF JUDGMENT FOR VALUE.

21. **Extinction of remedial right by legal proceedings.**—A possession wrongfully acquired or held may become a perfect title, legally unassailable, not only by the operation of the Statute of Limitations, but by any other method of extinction of remedial right, as by release from the true owner or by the exhaustion of legal remedy by satisfaction of judgment.

22. **Satisfaction of judgment for value.**—One wrongfully dispossessed of goods has the option of suing the wrongdoer for recovery of possession in specie by an action of replevin or detinue, or of suing the wrongdoer in trover for the value of the property converted. Where a defendant pays a judgment in trespass, trover, or other form of action, such as quasi-contract,[47] for the full value of the plaintiff's goods, the title to the goods becomes perfected in the defendant by a kind of a forced sale.[48]

Analogy to conditional sale. The question has been discussed whether satisfaction of judgment is necessary in order to vest title in the defendant, and whether title does not become vested in the defendant by the judgment alone, even without satisfaction.[49] Professor Williston suggests that in theory an

[47] Bauer v. Hess, 76 N. J. L. 257, 69 Atl. 966.
[48] Miller v. Hyde, 161 Mass. 472, 37 N. E. 760.
[49] Ames, 3 Harvard Law Review 326.

earlier time still should be recognized, as the plaintiff must have a cause of action justifying the recovery of full value at the time the action was brought, an assumption which would seem to call for the theory that the sale had been made and title had already passed to the defendant at the time the suit was filed.[50] But it may be pointed out that since the sale is one created by implication of law, it may well be regarded as conditional only, in which title and right of possession continue in the plaintiff as security until extinguished by full satisfaction and payment of the adjudged value. Thus in Miller v. Hyde,[51] the plaintiff not only took judgment in trover for a horse, but caused the horse to be attached in the action as the property of the defendant, and after judgment caused the horse to be seized in execution on the judgment as his property, and to be kept and offered for sale on execution; until, as it was about to be sold, she replevied it. The Supreme Court of Massachusetts held that her efforts to collect the value of the horse were not a final election to treat the title as transferred to the defendant. In other words, it was like a conditional sale, provisional upon completion of the levy and application of the proceeds upon her claim for damages.[52]

[50] Williston, Sales, § 570.

[51] 161 Mass. 472, 37 N. E. 760.

[52] Brinsmead v. Harrison, L. R. 6 C. P. 584, 587, 7 C. P. 547; 16 Harvard Law Review 131.

CHAPTER VI.

TITLE TO INTELLECTUAL PRODUCTS.

23. **Title to the product of labor.**—"It is generally recognized that one has a right to the fruits of his labor. This is equally true whether the work be muscular or mental or both combined. Property in literary productions, before publication and while they rest in manuscript, is as plain as property in the game of the hunter or in the grain of the husbandman."[53]

24. **Literary property at common law.**—The title to literary property is founded upon the right of an author to the results of his mental labor. At common law an author of any book or literary composition has the sole right of first printing and publishing his unpublished manuscript, and may bring an action against any person who prints, publishes or sells it without his consent. Literary property is protected, however, at common law only to the extent of the possession of the manuscript and its first publication by the owner. With voluntary publication to the world, the exclusive common law right is exhausted and the author must look alone for his future monopoly of publication to the copyright statutes. By a harsh rule of law, if he publishes his work without complying with the formalities of the

[53] Baker v. Libbie, 210 Mass. 599, 97 N. E. 109, 37 L. R. A. (N. S.) 944.

copyright act, all property rights are lost.[54] Publication operates to destroy common law rights whether a copyright be secured or not, and even though failure to procure copyright may be due to mistake or purely technical defects such as failure to print a formal notice.

25. **What amounts to publication.**—Reading or delivering or communicating a product orally or to a limited circle may nevertheless permit the author to retain the incorporeal right of repetition for personal profit, without abandoning it to unlimited use by all persons, the legal result of publication in print without copyright.[55] Thus in the case of Bartlett v. Crittenden,[56] Miller as a result of twelve years' experience in teaching the art of bookkeeping prepared a manuscript denominated, "An Inductive System of Double Entry Bookkeeping" and used it several years for lectures in the classroom. He permitted his students and teachers to copy his manuscript with a view to their own advantage and to enable them to instruct others. One of the students, with certain additions from the lectures of Professor Miller, made his manuscript into a book and had it printed.

The defendant, in the suit to enjoin publication, argues that the plaintiff had abandoned and dedicated his manuscript to the public by lecturing and permitting copies to be taken. But it was held, that while at common law an author has no perpetual or

[54] Holmes v. Hurst, 174 U. S. 82, LEADING ILLUSTRATIVE CASES; Palmer v. De Witt, 47 N. Y. 532, 7 Am. St. Rep. 480.

[55] Tompkins v. Halleck, 133 Mass. 32.

[56] 5 McLean 32, Fed. Cas. No. 1076.

exclusive right in the future publication of his work, he has a property in his production until it is published to the world with his consent. Delivering lectures in the classroom does not amount to such publication; nor would it have been otherwise in case of sermons or public addresses or plays, from the oral delivery of which there is no inference of a "publication."[57]

26. **Property in letters.**—There is a dual ownership in letters, the sender having the exclusive property in the literary composition, and the receiver having property in the document merely, which he may read, sell or destroy, but the contents of which he may not publish, sell or communicate without the writer's consent. Letters thus belong as chattels to the person to whom they are addressed and delivered, but they cannot be published against the will of the writer whether they have any value as literature or not. In the case of Baker v. Libbie,[58] an auctioneer was restrained by injunction at the suit of the executor from publishing certain autograph letters of Mary Baker G. Eddy, the founder of "Christian Science," even though the letters were mere friendly letters written to a cousin, with no attribute of literature. The property rights in the writing or composition remained in the writer and her representatives and not in the receiver, although the document and the right to transfer it vested in the latter.

[57] As to what constitutes publication, see Press Pub. Co. v. Monroe, 73 Fed. 196, 51 L. R. A. 353, note, LEADING ILLUSTRATIVE CASES; also 17 Harvard Law Review 266.

[58] 210 Mass. 599, 97 N. E. 109, 37 L. R. A. (N. S.) 944.

27. **Copyright statutes.**—A right to the future publication by an author of the fruits of his brain, if recognized at common law, could hardly be limited in time; it must be perpetual if it were anything extending beyond an author's lifetime. The explanation of the absence of greater recognition of the just title to literary products at common law is probably the difficulty of defining such rights, and the kind and amount of protection to be granted, which can only be defined properly by positive legislation. Statutes, therefore, confer a monopoly for a limited term of years in the sale and use of products of the mind, giving upon compliance with certain formalities of notice and registration, such limited rights as to enable the creator to reap the fruits of his labor and genius until he has received a proper reward for his efforts and outlay; and, at the same time, reconciling the creator's privilege with the interests of society so as to prevent extortion and promote human progress.[59]

28. **Good will and trademarks.**—The good will of a business, or expectation of continued public patronage, is also protected on the basis of being the result of labor and effort. "It is the policy of the law, for the advantage of the public, to encourage and protect invention and commercial enterprise. If a man establishes a business and makes it valuable by his skill and attention, the good will of that business is recognized by the law as property. If he adopts and uses a trademark (or a trade name) he has a remedy, either at law or in equity, against

[59] See Pollock, Expansion of the Common Law, p. 129.

those who undertake to use it (and divert his patronage by unfair competition) without his permission."[60] The property in trademarks and trade names used by a merchant to indicate his own productions is not in the symbol or word, but in the privilege of its exclusive use in his business.

29. **Patents.**—If a man makes a new and useful invention of any machine (or process) or composition of matter, he may, upon filing in a public office a description which will enable an expert to understand and manufacture it (and thus affording to all the means of ultimately availing themselves of it), obtain letters patent from the government securing to him its exclusive use and profit for a term of years.

30. **Trade secrets.**—"If a man invents or discovers, and keeps secret, a process of manufacture, whether a proper subject for patent or not, he has not indeed an exclusive right to it against the public, nor against those who in good faith acquire a knowledge of it; but he has a property right in it, which a Court of Chancery will protect against one who in violation of contract or breach of confidence (e. g., an employee) undertakes to apply it to his own use or disclose it to third persons."[61] Manufacturers frequently refrain from patenting their secret processes and devices, preferring the exclusive use and possession that result from secrecy, even at the risk of subsequent discovery elsewhere, to dedication to free public use after a term of years which results from a patent.

[60] Gray, J., in Peabody v. Norfolk, 98 Mass. 452.
[61] Gray, J., in Peabody v. Norfolk, 98 Mass. 452.

CHAPTER VII.

TITLE BY ACCESSION.

31. **Definition and scope of accession.**—Accession relates to the acquisition or forfeiture of title to a product which is the result of the incorporation or merging of one's materials with those of another, or the result of the bestowal of labor and expense in improving the materials of another.

32. **An accession falls to the principal.**—There is a legal maxim to the effect that title to an accession or increment follows the title of the principal thing; thus if the materials of one person are united to the materials of another by labor, forming a joint product by consent of both, the owner of the principal materials will acquire the property in the whole by accession. This was a principle of the Roman law, and it has been adopted to a certain extent in the common law.[62] The maxim would seem to apply in cases of combination of materials by the consent of both owners, as where a part of the raw materials are furnished by the manufacturer of an article and part by a customer. Title to the product is in the owner who furnished the principal part of the materials.[63] So when a chattel is affixed to land, as boards, bricks and stone in a house, it becomes part

[62] See 1 Am. & Eng. Encyclopedia Law and Procedure, p. 288.

[63] Mack v. Snell, 140 N. Y. 193, 35 N. E. Rep. 493, 37 Am. St. Rep. 534.

of the land and the property of the owner of the soil, even though without the consent of the owner of the chattel. The owner of the principal thing acquires title to the accessory added. Such, too, would doubtless be the rule in the case of union of chattels without consent, where that which is wrongfully taken is insignificant in value compared with the article made from it, as in the case of a picture, a violin, or a watch spring made from materials of another.[64]

33. **True basis of title by accession.**—Upon what principle may the law give even an innocent trespasser a right or interest in another's property which he has converted and improved? The general rule is that the owner of property does not lose his title merely because the thing is misappropriated by mistake and sold or improved without his authority. But it does not follow that the owner of the materials should necessarily acquire exclusive title to the increment or accession added by the taker. As a matter of justice it would seem that neither party should lose his contribution to the accidental partnership, as where bricks are made by one from the clay of another, or hay is made from land of another, worth many times as much as the grass uncut. The natural and normal adjustment of the rights of the parties would seem to be to make them co-tenants in the final product to which each has contributed

[64] Pulcifer v. Page, 32 Me. 404, 54 Am. Dec. 582, 1 Gray, Cases on Property, p. 53; Atchison, etc., Ry. Co. v. Schriver, 72 Kan. 550, 84 Pac. 119, 4 L. R. A. (N. S.) 1056. A bag filled with flour becomes a "sack of flour," and the sack of the customer is a minor accessory to the flour of the manufacturer, which is the principal thing.

material or labor, in proportion to the value of their respective contributions, at least where the improver has acted in good faith and the interests of the involuntary contributor can be protected.

34. **Co-tenancy deemed impractical.**—Co-tenancy is the rule in the analogous case of confusion or mixture of the goods of different owners where the resulting mass is easily divisible. In the case of accession, however, the final product is an independent, indivisible unit like hay or baked bricks, and one party or the other must be given exclusive possession. It has accordingly been assumed by the courts that title to the combination must be in one contributor or the other, and they have felt themselves confronted by this supposed dilemma,—that either the improver must gain title and the owner must lose his right and interest in the property, having left only a claim for the value of his materials; or else the owner must keep title to his materials with all the increments added thereto by way of accession, and the improver must lose entirely the value of his labor, since it is a general rule of law that you cannot improve a man's property without his authority and then charge him for it.[65]

35. **Innocent misappropriation.**—We shall now consider the various tests of ownership which are applied by the courts where a trespasser in good faith makes improvements upon the personal property of another—a matter upon which the authorities are not harmonious and for which no scientific or

[65] Weymouth v. C. & N. W. Ry. Co., 17 Wis. 550, 1 Gray, Cases on Property (2nd ed.), p. 54.

rational test has, as yet, been worked out by our system of law.

36. **Change of species test.**—The older common law authorities, which are still law in many states, make a change of species the controlling test. If the innocent converter sufficiently changes the nature of the materials so that they are no longer capable of identification by the senses, he is held to acquire title. Thus, it is said that if grain be made into malt, wheat into bread, or milk into cheese, it cannot be reclaimed by the owner because it cannot be known; but if cloth be made into a coat, leather into shoes, logs into boards, or iron into a tool, the identity is not gone and the materials may be reclaimed by the owner.[66]

There is confusion as to what does or does not constitute a change of species or identity;[67] and upon principle, it would seem unreasonable that a man should be deprived of the labor, time or materials which he has added to a thing mistakenly taken, or that an owner should be permitted to enjoy the fruits of another's labor rendered in good faith, without compensation, whether the species or identity be changed or not.

37. **Test of relative values.**—The more modern cases tend to discard arbitrary tests and distinctions based on mere physical alteration, and keep in view the circumstance of relative values rather than that

[66] Silsbury v. McCoon, 3 N. Y. 379, 53 Am. Dec. 307.

[67] Converting clay into bricks, the bricks being unburned, was held not so to change the species or identity as to transfer title; but as to the portion of the bricks burned, title was in the maker, as the identity of the clay was destroyed. Lampton v. Preston, 19 Am. Dec. 104 (Ky.).

of chemical change or mechanical transformation.[68] Thus in the leading case of Wetherbee v. Green,[69] where defendant had cut saplings on plaintiff's land in good faith relying on his supposed permission, and had by his labor turned them into barrel hoops worth twenty-eight times as much as were the saplings taken, it was held that the owner of the original materials could not reclaim the product and deprive the innocent converter of the results of all his labor; and that the title to the product had passed to the defendant who had made such a great increase in value. But in another case,[70] where timber was worked into cross ties, it was held that an increase of six-fold in value was not sufficient to bring the converter within the principle of Wetherbee v. Green.

Just what proportion of value must be added by a bona fide converter to acquire title does not seem to have been even approximately determined, other than to say that the increase should be so great as to "render the injustice of permitting its appropriation by the original owner so gross and palpable as to be apparent at the first blush."[71] There appears, however, to be no reason to confine this rule to cases where the enhancement is very great and the injustice of withholding title a *reductio ad absurdum;* unless possibly in case of the willful trespasser, if

[68] See Louis Werner Stave Co. v. Pickering, 119 S. W. 333 (Tex.).

[69] 22 Mich. 311, 7 Am. St. Rep. 653, 1 Gray, Cases on Property (2nd ed.), p. 62.

[70] Eaton v. Langley, (1898) 65 Ark. 448, 47 S. W. 123, 42 L. R. A. 474, LEADING ILLUSTRATIVE CASES.

[71] Isle Royale Mining Co. v. Hertin, 37 Mich. 332, 26 Am. St. Rep. 520.

the rule of Wetherbee v. Green should be extended to him also. More delicate scales ought to be available to the innocent improver. Title to the improved article might well be conferred on the party who contributes the principal part, or greatest value of workmanship or materials, subject to a claim for reimbursement or compensation in the other contributor, and subject to a lien on the product in favor of the party whose materials are taken without his consent. Such a rule would obviate uncertain speculation as to what degree of increase is necessary, and protect both parties in all cases.

38. **Co-tenancy in joint product.**—Co-tenancy is the solution of the accession problem adopted by the German law, except in cases of transformation by work, where the person deprived is entitled to claim compensation from the taker on principles of quasi-contract. So by statute in some states in the case of union of inseparable materials, the thing so formed is given to both proprietors in proportion to their respective contributions of materials and workmanship, but neither is deprived by mere mischance of his rights in the involuntary partnership.[72]

39. **Liability of owner for compensation to improver.**—The authorities apparently refuse to recognize any quasi-contractual claim to compensation where one by mistake performs labor upon the property of another, even if substantial benefit and increase in value result. In cases of enormous increase we have seen that the improver may, according to some authorities, gain title; but save in extreme

[72] Cal. Civ. Code, § 1029; Mont. Rev. Codes, § 1414.

cases of enhancement, the unfortunate improver will lose all the result of his honest labor. This is said to be based on the policy of discouraging heedlessness and blunders.[73]

It has been suggested by an able writer that this rule seems to be inconsistent with the measure of damages for conversion and puts a premium on physical recaption by violence.[74] Professor Woodward suggests that if one who improves goods by mistake is liable in trover only to the extent of the value of the materials at the time and place of the original conversion, he ought to have an affirmative claim for compensation for the benefits conferred when the owner retakes the property itself.

The bearing of the rules as to the measure of damages in trover on the rules as to acquiring title by accession, should be observed. Where one has converted and improved another's property as a result of inadvertence or mistake, and the wrong is not intentional (even though negligent), the defendant is, by most courts, held only for the value of the materials when they were first taken, e. g., the stumpage value of trees at the time they were cut, or at most, the value of the logs immediately after their severance; and this is so even if title to the property is still in the landowner and he could retake it in specie. Upon the other hand, if the materials be appropriated by willful trespass, the trespasser is held liable for the value of the goods, however improved, and the increased value is the measure of damages.

[73] Isle Royale Mining Co. v. Hertin, 37 Mich. 332, 26 Am. St. Rep. 520.
[74] Woodward, Law of Quasi-Contracts, § 190.

This rule, or one resembling it, is generally recognized, although the courts are not unanimous.[75]

The right of the plaintiff to recover the value of improvements to converted property against a converter is supposed to be based on his right to retake the property itself, though transmuted and enhanced in value by the defendant's labor. But the right to take the improvements simply results from the fact that the plaintiff cannot get his wood, or other materials, to which he still has title, without availing himself of the accretions resulting from the defendant's labor, as a return of the goods in their condition at the time of taking cannot be had; e. g., where logs are manufactured into pulp and the plaintiff still claims the right of possession of the product manufactured from his logs. Of course, if it be assumed that the wrongdoer's improvements really belong to the original owner, the owner gets no more than compensation when their value is awarded to him in place of possession. But if the defendant, by his labor, has a qualified or imperfect right of property in the increments which he has added to the goods converted, and is justly liable only for the original materials, then he should have a quasi-contractual claim for the value of the improvements when these are appropriated by the original owner to his benefit in retaking the converted property. The substantial rights of the defendant should be the same whatever the form of remedy selected, and a premium should not be placed upon recovering

[75] Trustees v. International Paper Co., 132 Fed. 92, 18 Harvard Law Review 305, 20 Harvard Law Review 227.

the property itself, even by a breach of the peace. If it be contended that to allow a converter to recover would be to compel the owner to pay for improvements not desired by him, the answer is that he may elect in every case to let the converter keep the property and recover the damages actually suffered as the result of the conversion. So in the case of land, Professor Woodward suggests that the owner should have the election either to pay for the improvements made by mistake, or to sell the land to the improver at its fair market value.[76]

40. **Willful trespasser can acquire no title by accession.**—Where ore is mined or timber cut from the land of another in willful or wanton disregard of the owner's rights, it is a general rule that the converter will acquire no title by accession no matter how greatly he may change the species or increase the value of the materials. The original taking being dishonest and in the nature of a theft, the enhancement of value is not permitted to inure to the benefit of the wrongdoer and the owner can recover the property in its improved state, or its equivalent value, with no deduction for the labor and expense put upon it by the defendant.[77]

This doctrine was applied in the case of Silsbury v. McCoon.[78] Silsbury took corn which he knew belonged to Wood and converted it into whiskey. McCoon, one of Wood's creditors, seized the whiskey on

[76] Law of Quasi-Contracts, § 188.

[77] Woodenware Co. v. U. S., 106 U. S. 432, 1 Gray, Cases on Property (2nd ed.), p. 74; Meyers v. Gerhart et al., 54 Wash. 657, 103 Pac. 1114, LEADING ILLUSTRATIVE CASES.

[78] 3 N. Y. 359, 53 Am. Dec. 307, 1 Gray, Cases on Property (2nd ed.), p. 44.

execution as belonging to Wood. McCoon, the defendant, purchased it at the execution sale and converted it to his own use, claiming under the title of Wood. Plaintiff sues for the value of the whiskey which he had manufactured from the grain, and argues that Wood's title to the corn must be deemed extinguished by its being transformed into whiskey, a product of a different species. But it was finally held that a willful trespasser cannot acquire title to property by changing it from one species to another, upon the principle of accession. The original owner can follow his materials so long as he can trace them, even though the product be something of very different identity and value.

Bronson, Ch. J., dissented on the ground that the severe rule which permits the owner to follow and retake a new product after the property has been changed into a different species, works an injustice by going beyond the proper measure of redress, even against a willful trespasser or thief. He concludes his opinion thus: "If a man steal a piece of timber, and place it as a beam or rafter in his house; or a nail, and drive it into his ship; or paint, and put it upon his carriage, the owner cannot retake the goods, but is put to his action for damages; and this is so in the civil, as well as at the common law. If a thief take water from another's cistern, and use it in making beer; or salt, and use it in pickling pork; or fuel, and use it in smoking hams, I suppose that no one will say that the owner of the water, the salt or the fuel, may seize the beer, the pork or the hams, and there is no better reason for giving him the new

product, when sand is made into glass, malt into beer and coal into gas, or grain into whiskey. In the case now before us, the civilians would not go so far as to say that the owner of the grain might take the swine which were fattened on the refuse of the grain after it had been through the process of distillation. And yet, that would hardly be more unjust or absurd than it would be to give him the whiskey. There must be a limit somewhere."

The questionable doctrine of Silsbury v. McCoon seems generally to prevail, in spite of these counter-arguments, although it doubtless would not apply where the materials are consumed in use, as in the cases of food and fuel mentioned by Chief Justice Bronson.

Further limitations. Accession involves a joint product. Where a wrongdoer uses an instrument or tool belonging to another, the owner of the tool cannot claim the product or its value, though made with the aid of his property. Thus in a case where a corporation made an unauthorized use of stereotype plates, which it had been employed to prepare for the state, in making copies of the reports of the Nebraska Supreme Court for its own benefit, it was held that the state had no title to the books so produced by the use of its plates.[79] This was not a case of accession, as there was no joint product formed by the labor of defendants and the use of plaintiff's plates. So, if a converter should take a bear trap and set it on the public land and catch a bear therein

[79] State v. State Journal Co., 75 Neb. 275, 106 N. W. 434, 9 L. R. A. (N. S.) 174.

with his own bait, the bear would not become the property of the owner of the trap. A more doubtful case might be put where a passer-by out of curiosity should spring another's trap and the next day remove it a few yards and reset it with the same bait,—whether animals caught in the trap would belong to the converter or to the owner of the trap?

41. **Title of purchaser from willful converter.** —Even a bona-fide purchaser from a willful trespasser or converter acquires no title against the original owner, no matter how much the value may have been increased, as his vendor had none to give.[80] But in an Ohio case the court held that while the original owner has title, as against a thief, to the results of the thief's labor upon his timber, yet as against an innocent purchaser he should not recover the full value of the property in its improved state without deduction for the labor and expense put upon it. It does not comport with notions of justice and equity that against those who have done him no wrong (except a technical one) he should recover several times the value of what he has lost.[81] It would seem on true principle that even for willful conversion, where property has been increased in value by the defendant, the true measure of damages is the value at the time of conversion with interest.[82]

[80] Woodenware Co. v. United States, 106 U. S. 432; Sedgwick, Damages (9th ed.), § 504.

[81] L. S., etc., R. R. Co. v. Hutchins, 32 Ohio St. 571, 37 Ohio St. 282, 30 Am. Rep. 629. See also 18 Harvard Law Review 305.

[82] Sedgwick, Damages (9th ed.), §§ 499, 534. Compare, however, Trustees v. Internatl. Paper Co., 132 Fed. 92.

CHAPTER VIII.

TITLE BY CONFUSION.

42. **Nature of confusion.**—If similar goods of different owners become indistinguishably intermixed in a common mass so that the precise contributions of each cannot be identified, how are they to be severed? What are the rights of the different owners? Take, for example, grain or liquor or metals mixed or melted together. Does either one of the former owners acquire title to the common mass to the exclusion of the other, or do they become tenants in common of the whole in certain proportions?

43. **Where intermixture is accidental or by consent.**—Where the inter-commingling of goods is by consent, by act of a third party, or by accident of nature as in a shipwreck, the title of no one contributor is lost, although somewhat changed, each becoming a tenant in common in proportion to his respective contribution.[88]

44. **Elevator and warehouse cases.**—The most common case of lawful confusion is where A delivers his grain into a grain elevator or warehouse of B and this grain is confused with the grain of other owners. By withdrawals and deposits the entire contents of the warehouse may be changed several times before a particular depositor demands his grain. Here is a situation where not only has the

[88] Spencer v. Union Marine Ins. Co., L. R. 3 C. P. 427.

depositor's property been so confused that its identity is lost, but also the whole mass has given place to another mass of goods of the same sort.[84] At any given moment, all the holders of receipts for grain are tenants in common of the amount in store to the extent of their proportionate share.[85] The transaction may, however, amount to a sale to the warehouse man, when the goods are placed entirely at his disposal.[86]

45. **Tortious confusion by mistake.**—The intentional intermixture of one's property with that of another without his consent is a tort or legal wrong; but when done innocently, it does not necessarily cause the mixer to lose his property, provided he can show what proportion of value he has added to the mass; even if he has contributed articles of inferior quality, the owners become tenants in common and either party may take his share and make a division without resorting to the courts.[87]

46. **Willful confusion.**—If A willfully intermixes his grain or hay or timber or ore with that of B, so that it becomes impossible to distinguish what belongs to each, even here the mixer will not forfeit his contribution if the articles of the confuser are not of inferior quality, and he can show what proportion of value he has added to the mass.[88] By the better rule, he is entitled to such proportion, although some cases state that in all cases of fraudu-

[84] Williston, Sales, § 154.
[85] Hall v. Pillsbury, 43 Minn. 33, 44 N. W. 673.
[86] Chase v. Washburn, 1 Ohio St. 244, 59 Am. Dec. 623. See § 75.
[87] Pickering v. Moore, 67 N. H. 533, 32 Atl. Rep. 828.
[88] Hesseltine v. Stockwell, 30 Me. 237, 50 Am. Dec. 627.

lent intermixture where the specific contributions of the confuser cannot be distinguished or identified by him, the involuntary contributor is entitled to the whole without account.[89] Such a rule exacts not only damages, but a penalty from the wrongdoer, when to restore to the other his due proportion would do him full justice, and is out of harmony with the general rules of civil compensation or damages.

47. **Unequal values.**—Suppose inferior wine, oil, sugar, wheat, ore, timber, or gas to be dishonestly mixed with a far superior quality of the same article. The resulting mixture is of a lower average grade than the materials of the innocent, involuntary contributor, and the mixer could not be allowed to share in proportion to the relative amount, number, or weight, which he contributed, but only according to the value. The rule is laid down in many cases, however, as if it were inflexible, that the party guilty of fraudulent confusion of goods of inferior quality or value with the superior goods of another, forfeits all interest in the mass and the injured party takes the whole.[90] Thus, in the case of The Idaho,[91] the Supreme Court of the United States held that where one wrongfully mixed 25 bales of cotton belonging to himself with 140 bales of different weight and grade which belonged to another, so that the contributions could not be identified, the right of possession of the whole was in the innocent party,

[89] Ryder v. Hathaway, (1838) 21 Pick. 298 (Mass.).

[90] But query, if the mixer can show what value he has contributed.

[91] 93 U. S. 575, 23 L. Ed. 978. See also Jenkins v. Steanka, 19 Wis. 126, 88 Am. Dec. 675, 1 Gray, Cases on Property (2nd ed.), p. 108.

and the mixer was not entitled to any bale which he could not identify as one of his lot of 25. He was not entitled to his proportionate 25 out of the 165 bales resulting from the mixture.

So in the case of Hesseltine v. Stockwell,[92] a confuser cut on his own land about 600,000 feet of pine timber, and also cut on the land of the plaintiff, Hesseltine, about 100,000 feet of timber, all of the logs being marked with the same mark and hauled to the same landing place. A residue of the mass was sold to the defendant. The plaintiff seized this which he claimed as his part of the logs, but the defendant took back the lumber out of the plaintiff's possession. Plaintiff sued in trover for the value of his interest in this part of the larger lot of 700,000 feet. The Maine court held, (1) if the commingling was accidental or by mistake as to title, plaintiff and defendant became tenants in common in due proportion, and plaintiff could recover for such proportion as the logs cut on his land bore to the whole number; but (2) if the trespass and commingling were willful and the logs were of unequal value, the whole lot of logs would become the property of plaintiff from whose land a portion of the mass was cut. (3) There would be, however, no forfeiture, even in the case of willful trespass, if the goods intermixed were of equal value.

48. **Remedies.**—The remedies of the parties whose goods are confused would seem to be as follows: In the case of innocent confusion, neither has a right to appropriate the whole mass. The inno-

[92] 30 Me. 237, 50 Am. Dec. 627.

cent party out of possession should invite the mixer to make a division, and on his refusal may take his own proportion, taking care to leave the other as nearly as possible what belongs to him. The owner of logs confused with those of a trespasser will not be liable as a wrongdoer for taking what he believes to be his share, even if he seizes more than ultimately proves to have been cut on his land, having no means of ascertaining the exact amount. He may, perhaps, take all, or at least as much as he in good faith believes to be necessary to recompense him.[93] Either contributor can recover by replevin from the possessor of the mass a quantity equal to the amount he contributed without identifying the property as his original material.[94] All possible inconvenience, however, or risk of loss from the confusion, is thrown upon him who produces it, and it is for him to distinguish his property or to show his share. Even if the goods confused were of the same kind and value, the wronged party would have the right of possession of the entire aggregate, leaving the wrongdoer to reclaim his share if he can prove his proportionate part.[95]

If confusion of goods be caused with fraudulent motive by a willful trespasser who mixes his own ore or his own logs or oil or gas with those of his innocent neighbor, and willfully neglects to keep account of the amount of the respective contributions, and

[93] Smith v. Morrill, 56 Me. 566.

[94] Rust Land Co. v. Isom, 70 Ark. 99, 66 S. W. 434, 91 Am. St. Rep. 68. Compare Meyers v. Gerhart et al., 54 Wash. 657, 103 Pac. 1114, LEADING ILLUSTRATIVE CASES.

[95] Wright v. Ellwood Ivins Tube Co., 128 Fed. 462.

there are no means of exactly determining each one's share, a guessing method of apportionment will not be adopted, but the wrongdoer will lose his property, as all will be treated as if it were the property of the involuntary contributor until the contrary is shown.[96]

49. **Comparison of confusion and accession.**—In the case of confusion, where the result is a mass and not a single product, the contributors are treated as tenants in common of the mass where this is practicable. If the mass is capable of fair apportionment the law gives each his share, and aims to enforce no arbitrary forfeiture on the mixer, although some cases do this as against a fraudulent confuser. Unlike the rule in accession, the passive party never loses title by confusion. If the mixing was accidental, or not dishonest, each takes in proportion to his contribution; and even if willful, the better rule is the same, if the goods are of uniform quality, or those contributed by the confuser are not inferior. In the case of accession, where partition is more difficult, the common law tends to confer title on the largest contributor, leaving the other to a pecuniary claim for his contribution.

50. **Confusion by fiduciary—Tracing mingled funds into the product.**—Where an agent, collector, attorney, or trustee deposits moneys held by him as fiduciary for another, in one account with his own personal funds, to whom, in equity, does the resulting claim or credit belong? The entire credit ac-

[96] Stone v. Marshall Oil Co., 208 Penn. St. 85, 57 Atl. Rep. 183, 101 Am. St. Rep. 904, 913, note.

count does not belong to the owner of the moneys misapplied, nor to the wrongful depositor, but the parties become co-owners in the proportion which their contributions bear to the sum total. Though money be confounded in a general mass, or converted into another species of property, yet it may be followed into its product or substitute, and is a charge upon any new investment, deposit in a bank, or purchase of land or stock, to the extent of the money traceable into it. The proceeds stand in equity for the original thing so long as they can be traced or identified.[97]

51. **Deposits and withdrawals.**—Suppose that from time to time, after the confusion of a fund, the wrongdoer deposits in the bank and withdraws from the account divers amounts; can the defrauded owner still trace his money into the balance? This may become a question of the greatest importance where the assets of the insolvent confuser are being distributed in bankruptcy or insolvency by the trustee or receiver of his estate, and a defrauded owner claims a prior lien on the mass into which his funds have entered.

52. **As against the trustee.**—As between the trustee or fiduciary and the beneficial owner, where trust funds are mingled with individual funds, withdrawals will be first charged to personal funds, though the latter are received and deposited subsequent to trust funds. It is for a wrongdoer to distinguish between his own property and that of an innocent party with which he has confused it. So long as

[97] Central Nat'l Bank v. Conn. Mutual Life Ins. Co., 104 U. S. 54.

there is a balance continuously remaining on hand, this is appropriated by law to the innocent party, as presumably representing his contribution. It is otherwise expressed by saying that the charge or lien extends to the whole mass, and paying out part does not remove the charge from the remainder.[98] Proof that a trustee mingled trust funds with his own and made payments out of the confused fund is sufficient identification of the balance of the fund coming into the hands of a receiver, not exceeding the smallest amount the fund contained subsequent to the commingling. The presumption is that the trustee neither paid out the trust moneys nor invested them in other property, but kept them sacred; but if ever the balance is reduced to zero, even for a day, the claimant would have no specific or preferred claim on subsequent deposits.

53. **As against general creditors.**—The mere misapplication of trust funds or the misappropriation of other property does not create a claim in the defrauded owner superior to that of the general creditors. If, however, the checks, or cash, or their proceeds, can still be traced into any specific bank deposit, land, chattels, or securities on hand, by which the fund for distribution among the creditors of the wrongdoer is swelled or increased over what it would have been but for the misappropriation, the victim has a paramount lien or equity as co-tenant to come in ahead of general creditors in bankruptcy, as where a deposit is accepted by an insolvent bank

[98] Bank v. Peters, 123 N. Y. 272, 25 N. E. 319; Central Nat'l Bank v. Conn., etc., Co., 104 U. S. 54; In re Hallett's Est., 13 Ch. D. 696 (Eng.).

just before it closes its doors.[99] But it is indispensable to the claim for preferential payment out of the proceeds of the estate of an insolvent on the basis of confusion of one's property therein, that clear proof be made that the property is actually included in the estate and went into a specific fund or a specific, identified piece of property which came into the hands of the receiver or trustee in bankruptcy. It is not sufficient merely to prove that trust property or its proceeds went into the general assets of the insolvent estate.[1]

54. **As between innocent contributors.**—Where a trustee, or fiduciary, has mingled in a common fund the moneys of several different equitable owners, and has then made payments out of the common fund, the legal presumption is that the moneys were paid out in the order they were paid in, and the contributors are equitably entitled to claim the preference in the inverse order of time of their respective contributions to the fund. Thus, in Cohnfeld v. Tanenbaum,[2] a guardian having a bank account in his name as guardian, deposited in the guardianship account moneys belonging to a manufacturing company of which he was manager. There were no individual moneys of the trustee involved. It was a case where the account standing in the name of Cohnfeld was made up of the deposits of two dis-

[99] J. B. Ames, Following Misappropriated Property into its Product, 19 Harvard Law Review 511.

[1] The rules by which preferential payments of the proceeds of property confused by an insolvent must be adjudged are well summarized by Sanborn, J., in the case of Empire State Surety Company v. Carrol County, 194 Fed. 593.

[2] 68 N. Y. Suppl. 1023.

tinct parties, and Cohnfeld, acting in a fiduciary capacity for both, mingled their moneys. The court held that as between the two contributors the rule in Clayton's case applied.[3] That was a case of a banking account, where various sums were paid into and withdrawn from one blended fund. Sir William Grant, in his opinion, says:

"In such a case there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried into the account. Presumably it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts current are settled, and particularly cash accounts."

In Knatchbull v. Hallett,[4] it was held by Fry, J., that as between two cestuis que trustent, whose money the trustee has paid into his own account at his banker's, the rule in Clayton's case applies, so that the first sum paid in will be held to have been the first drawn out. And in Hancock v. Smith,[5] it was held that, as between cestuis que trustent, the rule in Clayton's case is applicable.

[3] Devaynes v. Noble, 1 Mer. 580 (Eng.).

[4] In re Hallett's Est., 13 Ch. Div. 696 (Eng.).

[5] 41 Ch. Div. 456 (Eng.). Compare, however, In re Mulligan, 116 Fed. 715, 16 Harvard Law Review 148.

CHAPTER IX.

TITLE BY GIFT.

55. **Transfer of title by act of the parties.**—Every right of property has a title or source from which it is derived. We have considered title by original acquisition; we now proceed to titles which are derivative, as where the hunter, fisherman, or adverse possessor transfers his acquired right to another. Transfer may be either by act of the parties, or by act of law, according as it occurs by declaration of the will of the owner, as in gift or sale, or is involuntary as in case of intestate succession, execution sale, or bankruptcy. Acts of the parties may be unilateral, if there is only one party whose will is operative, as in gifts and deeds; or bilateral, if agreement or mutual concurrence of both transferor and transferee is involved, as in sales.

56. **Nature of gift.**—A gift is a present renunciation or relinquishment of title by one to another, with the intention that the title pass to the donee without remuneration or consideration. This is effected either by the expression of an intent to give, executed by delivery of the thing given to the donee or to someone for his benefit; or by the declaration of the intent to give evidenced by a deed duly sealed and delivered. Gift is a unilateral act and may be effectuated without the agreement, acceptance, or knowledge of the donee, though subject to rejection

by him. It is sometimes attempted to assimilate gifts to bilateral agreements by saying that the acceptance is presumed; but in reality, the essential elements in gift are: (1) an intent to make a present gift, and either (2) physical relinquishment of dominion by delivery, or (3) delivery of a deed or writing as formal evidence of the transaction. The requirement of delivery is probably founded on the policy of exacting tangible evidence of a clear, final, and deliberate intent to give, and of preventing fraud.

57. **Gift by deed.**—The general rule is that the declaration of a present transfer evidenced by a deed duly executed and delivered by the donor is a valid gift inter vivos (between living persons) without any delivery of the property itself.[6] Thus, in Driscoll v. Driscoll,[7] a father, several years before his death, executed a written instrument assigning to his daughter certain real estate and also his interest in a partnership, including all the machinery, tools, and personal property of the firm of which he was a member. The instrument was delivered to a third party for safe-keeping, who kept it until after the death of the father, when he delivered it to the daughter. The father continued his former relations with his partners and acted as a member of the firm until his death, just as before the execution of the deed. His widow was appointed administratrix of his estate and sued to recover the property on the

[6] It is doubtful whether a gift causa mortis (in view of death) can be made by deed without a delivery of the property given. 20 Cyc. Gifts, p. 1235, note 25; Knight v. Tripp, 121 Cal. 674, 54 Pac. 267.

[7] 143 Cal. 528, 77 Pac. 471.

ground that the deed was made without consideration, and that possession of the personal property therein described was not delivered to the daughter in the lifetime of her father, but was retained by him until his death. It was held that delivery of the written instrument was sufficient to make a valid gift, and the fact that the father continued to deal with the partnership property as if he owned it did not impair the title obtained by the daughter, nor restore the ownership to the father.

An instrument of gift, it seems, would have to be under seal where the donor retains possession, in states where a seal is required for a deed or conveyance of real property.[8] It has been held that the delivery of a written assignment or bill of sale of stock by way of gift is insufficient to complete a valid gift where the vendor retains and uses the certificates to control the stock. One ground of the decision was that the delivery of the certificates of stock, when they are present and their delivery is practicable, is indispensable to a valid gift of the stock, because the possession of the certificates commands the dominion of the stock in the most effectual way.[9]

58. **Delivery, necessity of.**—Mere words of gift, as "I give you these colts," are inoperative, the mere oral declaration or promise that title shall pass by way of gift having no effect.[10] To constitute a valid gift there must be an intention to give, likewise a

[8] Connor v. Trawick's Admr., 37 Ala. 289, 79 Am. Dec. 58.

[9] Allen-West Com. Co. v. Grumbles, 129 Fed. 287, LEADING ILLUSTRATIVE CASES.

[10] Irons v. Smallpiece, (1819) 2 B. & Ald. 551; Cochrane v. Moore, 25 Q. B. D. 57.

delivery to the donee, or to someone for him. The intention must be executed by a complete and unconditional delivery.

There is no valid gift unless there has been present relinquishment of dominion by the donor. Thus, if a husband places certain securities in an envelope and endorses it, "The enclosed are for my wife, Mary," signs his name, and puts the envelope with its contents into his safe deposit box, this is not a valid gift. There has been no delivery and a gift cannot be made to take effect in the future. So, if he tells his nurse in his last sickness that his pocket-book or watch is under his pillow, and that she is to take it and give it to his wife, and the pocket-book or watch is not handed over until after his death, it would not be a valid gift, as there would have been no delivery in the lifetime of the donor.[11] In Liebe v. Battmann,[12] one about to commit suicide endorsed a promissory note, sealed it in an envelope directed to a friend with whom he was living, placed it in an envelope upon a table beside his bed, together with a letter to the friend, and then shot himself. The friend rushed in from his room in another part of the house, but the dying man, without referring to the gift, passed into a comatose state from which he never rallied.

It was held that there had been no delivery of the note in spite of the fact that the friend had picked up the envelope before the donor died, though after he became unconscious. The court said, "There

[11] Wilcox v. Matteson, 53 Wis. 23, 9 N. W. 814.

[12] 33 Ore. 241, 54 Pac. 179, 72 Am. St. Rep. 705, 12 Harvard Law Review 349.

must be a parting with dominion over the subject matter of the gift with the present design that the title shall pass out of the donor to the donee." There was a change of possession before death, yet placing the addressed envelope on the table where it was still under the hand of the donor was not a delivery. Receipt of the letter as intended during life might possibly have been held equivalent to delivery of a deed. Thus if a document is mailed by a man about to die, but he becomes unconscious or dies before it is actually received, there would doubtless be held to be a delivery by the act of mailing and putting it beyond his recall.

59. **Change of possession not required in gifts inter vivos (between living persons).**—Delivery may either precede or follow the declaration of gift, and where goods are already in the exclusive possession of the donee, the mere oral declaration completes the gift, the act of the donor in receiving back and redelivering to the donee the subject of the gift being excused as a useless ceremony, at least as to gifts inter vivos (between living persons).[13] There must, however, be nothing left to be carried out by the donor, or he will have a locus pœnitentiæ (an opportunity for repentance). It is not necessary that the donee retain possession after delivery. In a Michigan case, plaintiff brought replevin for possession of a ring, to which he claimed title by gift, against a decedent's estate. While they were at a party playing cards, the decedent, an elderly aunt, gave plaintiff

[13] 10 Harvard Law Review 306; 18 Harvard Law Review 394. The rule may be otherwise as to gifts causa mortis, or where the parties reside together.

a diamond ring and he accepted it; the donor then borrowed the ring back to wear until she was done with it and kept the ring in her possession until her death. It was held that the loan by the donee to the donor did not affect his title. Retention or resumption of possession by the donor has no effect on the gift except as evidence of no delivery, or of no present intent to give.[14]

60. **Declaration of trust.**—There is a wide difference between the stern and unbending rule of the common law which makes either delivery or a deed essential to a gift of the legal title, and the rule of equity which recognizes a gratuitous parol declaration of trust as sufficient for a gift of an equitable interest. The fact remains that delivery is not necessary to a gift made by way of a declaration of trust. Thus, in Harris Banking Co. v. Miller,[15] a bank issued to B a certificate of deposit for $8,000, which he endorsed to Mrs. Miller before his death. When B died, this certificate of deposit was found in a leathern bag sewed in his shirt. He kept it to draw the interest while he lived. The defense was set up that the gift was invalid for want of delivery of the certificate; but it was held that while there was no sufficient delivery to make a perfect gift, yet the assignment was valid as a declaration of trust of which the donor was trustee.[16]

[14] Garrison v. Union Trust Co., 164 Mich. 345, 129 N. W. 691, 32 L. R. A. (N. S.) 219; but in gifts causa mortis in some courts the donee must retain possession; see Parker v. Copland, 64 Atl. 129 (N. J.); 20 Harvard Law Review 151; 12 Harvard Law Review 570.

[15] 190 Mo. 640, 89 S. W. 629, 1 L. R. A. (N. S.) 790.

[16] See also Dewey v. Barnhouse, 83 Kan. 12, 109 Pac. 1081, 29 L. R. A. (N. S.) 166, note.

61. **Constructive delivery.**—Ceremonial or constructive delivery is held sufficient under special circumstances when manual delivery is inconvenient, as where articles are of a bulky character or not readily accessible. Thus, in Waite v. Grubbe,[17] a father pointed out to his daughter various places on his farm where his money was buried and declared that he gave it to her. The daughter did not remove the money until after the father's death, yet the pointing out of the hiding places was held a valid constructive delivery. Principle requires, however, that delivery shall, in every case, consist as far as practicable of a delivery of that thing which will most effectually and irrevocably divest the donor of the dominion and the control of the subject of the gift.[18] A document, such as a bill of lading, a deposit book, a stock certificate may be given where it represents the title and is the means to command control of the property. These documents of title are often, by usage, essential to control or deal with the property, and it has been held that a written assignment of corporate stock is inadequate to transfer title where the donor retains the stock certificates.

Property kept in a bureau or trunk not readily accessible, and ponderous or bulky articles kept in a warehouse, may be delivered by delivery of the key to the receptacle or place of storage.[19] Con-

[17] 43 Ore. 406, 73 Pac. 206, 99 Am. St. Rep. 764.

[18] Allen-West Com. Co. v. Grumbles, 129 Fed. 287, LEADING ILLUSTRATIVE CASES.

[19] Thomas' Admr. v. Lewis, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848.

structive delivery, however, seems to be limited to such property as is not reasonably capable of actual transfer, or manual delivery. A delivery of the key to a receptacle which is itself present and capable of delivery will not of itself constitute a delivery of its contents, as this is not the best delivery possible under the circumstances.[20] So it was held that a direction to a person who already had both keys of a small box to take "my" key and keep it, with a declaration of gift of the stock in the box which was in an adjoining room, was not a good delivery to sustain a gift causa mortis (in view of death).[21] As is shown, however, in many cases collected in the note to the case last cited, there is a great diversity in the decisions as to when the delivery of a key to a cash box, bureau, trunk, desk, or other receptacle, will be a good and sufficient gift of the contents, and what is a valid reason for handing over the key rather than the receptacle itself or its contents.

62. **Gift of one's own, or another's, obligation.**— The gift of one's own check or promissory note is, in effect, a mere promise to give, like signing a subscription paper, and as such is revocable. In a Kentucky case, deceased signed checks to his wife and to his nephew for $500.00 each, payable out of his estate after his death, and the checks were delivered. He also endorsed a note to his wife, but by the endorsement reserved the interest for himself as long as he should live, and the principal of the note in

[20] Compare Keepers v. Fidelity, etc., Co., 56 N. J. L. 302, 28 Atl. 585, 23 L. R. A. 184.

[21] Apache State Bank v. Daniels, 121 Pac. 237 (Okla.), 40 L. R. A. (N. S.) 901, note, LEADING ILLUSTRATIVE CASES.

case he survived her. It was held that the checks were not good as a gift, being mere orders incomplete until paid or accepted. As to the note, the rights retained by the donor were inconsistent with a gift since the transfer was not to become effective until the death of the donor, and such limitation makes it an attempted testamentary disposition rather than a gift.[22] It is, however, held by some states that a check drawn on a bank for the entire amount of the drawer's credit therein and delivered as a gift of the money, amounts to a present assignment of the debt due from the bank to a depositor, even though unaccepted by the bank.[23]

The voluntary and gratuitous assignment of an obligation already created against some other party is entirely different from the gift of one's own check or promissory note. The law is somewhat unsettled as to what is necessary in order to make a valid gift of a chose in action. Where a chose in action such as corporate stock, or a deposit in a savings bank, or an insurance policy, is evidenced by a document, it may be transferred by a deed or by the delivery of the certificate, deposit book or other document representing the obligation. A delivery of certificates of corporate stock to the donee or a declaration of trust by the donor, although without endorsement of the certificates and without transfer or registration on the books of the corporation as required by its by-laws, is generally held sufficient to constitute a valid

[22] Foxworthy v. Adams, 136 Ky. 403, 124 S. W. 381, 27 L. R. A. (N. S.) 308, Ann. Cas. 327.

[23] Varley v. Sims, 100 Minn. 331, 111 N. W. 269, 8 L. R. A. (N. S.) 828.

gift of stock. The theory of this is said to be that title passes to the document and carries with it a power of attorney to the donee to transfer the stock or collect the claim for his own use.[24]

A parol chose in action like a debt is incapable of delivery and it would seem on the authorities that a voluntary written assignment of a parol chose in action is revocable. Only by a declaration of trust can there be a valid gift of a parol chose in action.[25]

Gifts of the personal obligation of a third party may also be accomplished by making a contract such as life insurance for the express benefit of the donee; or by a deposit of money in a bank in trust for the donee even without his knowledge, where the deposit book evidences the donee's beneficial interest. By the weight of authority the mere deposit of money in the depositor's own name in trust for a third party, although without delivery of the pass book or other evidence of intention to make a gift, will be sufficient, of itself, to constitute a valid gift.[26] But if A deposits money in a savings bank in the name of B and takes the savings bank book in B's name, it is a question of fact whether he intends to create a claim for B, or for himself in B's name. There must be a clear intention on the part of the donor to relinquish immediately to the donee all control over the fund. Thus where A put a deposit in the names of A and B, there was held to be no gift, since A would retain control during

[24] Talbot v. Talbot, 32 R. I. 72, 78 Atl. 535, Ann. Cas. 1912 C. 1221, 5 Harvard Law Review 35; 24 Harvard Law Review 428.

[25] See Bond v. Bunting, 78 Penn. St. 210, 213, 218.

[26] See note 1 L. R. A. (N. S.) p. 790; 20 Cyc. Gifts, p. 1204.

his life.[27] The idea of a gift is inconsistent with the retention by the donor of power to withdraw the deposit from the bank.[28] In the case of trust deposits in a savings bank in the depositor's own name as trustee, for the benefit of third parties (where the depositor retains the deposit book in his own hands), it is held in New York that these are "tentative" trusts merely, revocable at will by the depositor in his lifetime; but if the depositor dies without having revoked the gift, a presumption arises that an absolute trust was created as to the balance on hand.[29] The donor-depositor thus enjoys full dominion of the money during his life and the gift in reality takes effect on death.[30]

In case of an ordinary deposit in a commercial bank, delivery of the deposit book, which is a mere receipt, would not be a valid gift, as the deposit book is not the indispensable key to the deposit, which may be drawn without it.

63. **Conditional gifts.**—Gifts may be qualified by reservations in favor of the giver as to the income, use, or enjoyment of the thing given, and these are not necessarily inconsistent with the absolute character of the gift.[31] In Williamson v. Johnson,[32] plaintiff let defendant have certain sums of money

[27] Schippers v. Kempkes, 67 Atl. 74 (N. J.), 12 L. R. A. (N. S.) 355, 22 Harvard Law Review 453.

[28] Compare the case of Denigan v. Hibernian, etc., Society, 127 Cal. 137, 141, 59 Pac. 389.

[29] Re Totten, 179 N. Y. 112, 71 N. E. 748, 70 L. R. A. 711, 19 Harvard Law Review 207.

[30] 19 Harvard Law Review 207, 18 Ib. 70, 626.

[31] Candee v. Conn. Savings Bank, 81 Conn. 372, 71 Atl. 551, 22 L. R. A. (N. S.) 568, 22 Harvard Law Review 453.

[32] 62 Vt. 378, 20 Atl. 279, 9 L. R. A. 277.

as gifts in the expectation by both parties of marriage. The gifts were made for the purchase of wardrobe and for traveling expenses of the girl. It was held that when she broke the engagement the money could be recovered for breach of conditions on which the gifts were made. The mere gift of the use or the income of a thing would be a loan rather than a gift.

64. **Gifts causa mortis.**—Gifts causa mortis, that is, in view of death, are those which are made in contemplation, fear or peril of death then imminent, as the moving cause; as when a person in serious sickness, apprehending his dissolution near, delivers or causes to be delivered to another possession of any personal goods to keep in case of his decease. The gift is vested by delivery, but is accompanied with this express or implied condition, that if the donor lives, the property shall revert to him. The gift, though vested, is defeasible by revocation at any time. It has thus the revocable quality of a legacy or bequest, and in this differs from a gift inter vivos (between living persons). Gifts inter vivos and gifts causa mortis are alike in most particulars, but different in this important respect—a gift inter vivos must be irrevocable or it is invalid, while a gift causa mortis is revocable by the donor at any time before his death.[33] At law a gift inter vivos would be void if a donor reserved the power of reclaiming or revoking it at will; yet in equity, a revocable gift inter vivos may be made by the device of a revocable declaration of trust.

[33] Basket v. Hassell, 107 U. S. 602.

There is some conflict in the authorities whether title vests at once upon delivery, subject to be defeated by recovery of the donor or by revocation, or whether title vests only on death. By the better view title passes when the gift is made, subject to certain conditions subsequent.[34]

There must be a delivery, actual or symbolic, and this is even more strictly insisted on than in the case of gifts inter vivos.[35] Since virtually (though not technically) a gift causa mortis amounts to a testamentary disposition, a formal act of delivery should be required to supply a substitute for the formalities of an attested will, and the gift should remain entirely beyond the control of the donor. A gift made in the absence of sufficient peril of death, which is to take effect only on the death of the donor, and where death is a condition precedent to the relinquishment of dominion, is void. So where delivery of certificates of deposit was qualified by an endorsement which restrained the authority of the donee in the collection of the money and forbade its payment until the donor's death, this was held not a valid gift causa mortis. Such a gift is a testamentary disposition to take effect only on the death of the donor, which must be made with the formalities of a will. It is not a present executed gift.

65. **Invalid gifts.**—There are the same requisites of capacity, fairness, and freedom from fraud and

[34] Johnson v. Colley, 101 Va. 414, 44 S. E. 721, 99 Am. St. Rep. 884, 891, note.

[35] 18 Harvard Law Review 394; 20 Harvard Law Review 151. Parker v. Copland, 64 Atl. 129 (N. J.). Compare 12 Harvard Law Review 570.

constraint upon the donor in the case of gifts as in the case of contracts; but from their gratuitous nature gifts may be even more closely scanned than bargains. There is a presumption of undue influence from the existence of confidential relations, such as that of attorney and client, priest and penitent, guardian and ward, between parties to a gift inter vivos, probably also in case of a gift causa mortis, but not in the case of a testamentary gift.[36] Further, as to third parties, a man must be just before he is generous; and the donor's creditors may impeach a gift made in fraud of their claims when he is insolvent.

[36] 14 Harvard Law Review 73; 22 Harvard Law Review 539.

PART II

BAILMENTS

CHAPTER X.

THE NATURE OF BAILMENT.

66. **Special proprietary interests.**—Having considered the different kinds of titles by which ownership may be acquired in things personal, we proceed to the principal modifications of absolute ownership by which partial interests may be held in the same object by several proprietors. Ownership, the full and complete dominion of a single proprietor over an object, by which he may deal with the thing as he pleases and exclude all others, may be split up and subdivided in various ways among several proprietors. This is most elaborately carried out in the common law system of estates in land, in a single parcel of which there may be interests of the most manifold variety as to duration, extent and number of tenants. In personal property the subdivision of ownership is much simpler, the most important subordinate interests being (1) bailments, or possessory rights under the ultimate owner; (2) plurality of tenants, as where two or more persons are co-owners; (3) future estates; (4) security interests, as where the ownership is divided between pledgor and pledgee or between mortgagor and

mortgagee, and (5) equitable interests. Such are the principal modifications of absolute ownership, by which lesser rights or qualified interests are divided off from the complete or entire ownership.

67. **The law of bailments.**—The general term bailments embraces transactions so diverse in their objects and legal consequences that one would hardly expect to find it the title word of an important subject, or special branch of the law; yet Lord Holt, in the celebrated case of Coggs v. Bernard,[37] imported into the common law a classification of bailment contracts from the Roman system, and three-quarters of a century later (1781), Sir William Jones wrote his famous Essay on the Law of Bailments. Since that time, we have had a number of learned treatises upon this subject as a recognized topic of our common law, notably the treatise of Mr. Justice Story.

68. **Scope of law of bailments.**—The various forms of bailment: the deposit of goods to be kept by the bailee without reward (*depositum*); the gratuitous lending for use by the bailee without reward (*commodatum*); the letting and hiring of goods for a rental (*locatio rei*); the delivery for hired services to be performed upon a chattel (*locatio operis faciendi*); for storage (*locatio custodiae*); for transportation and carriage (*locatio operis mercium vehendarum*); the pledge of goods as security for an obligation (*pignus*); all these varieties of transactions have only two connecting threads to justify treating them together, namely: (1) the severance

[37] Queen's Bench, (1703) 2 Ld. Raym. 909 (Eng.).

of possession from the ownership or general property; and (2) the imposition by the law of certain obligations upon the bailee on the basis of his undertaking the care or charge of the property. These different bailments, the pledge, the deposit for safe custody, the delivery to a carrier or to an artisan who is to do work upon a thing, the gratuitous loan, the letting for hire, give rise to very different obligations and tort liabilities between the parties according to the nature of the transaction. The law of bailments customarily includes a treatment of special obligations and liabilities of innkeepers, carriers of goods, and also carriers of passengers, particularly railroads, as well as of liens and pledges; the topic, in short, seems a miscellaneous dumping-ground or hodge-podge of a variety of subjects little related, which have found no other grouping or abiding place in our law, and of which the bailment relation is not always the most significant feature.

We shall first consider the nature of bailment and distinguish it from certain other transactions; and then proceed to examine the respective rights of property in the thing bailed, particularly with reference to third persons; and lastly, consider more particularly the obligations of bailor and bailee as between themselves.

69. **Creation of bailment.**—Bailment (derived from the French *bailler,* to deliver) arises where the possession and charge of goods are accepted by the bailee on delivery or consent of the bailor, giving the bailee the exclusive control for the time being, upon the understanding, express or implied, that

the goods shall be redelivered to the bailor either on demand or at an agreed time, or dealt with according to his directions. Bailment may, however, be created, even where there is no delivery or actual consent by the bailor, as where control is assumed over goods apparently lost or abandoned, and the finder takes charge of the goods for the owner; so where one takes a watch from the person of a drunken owner with friendly intention, a bailment arises. By attornment, a person in possession may become the bailee of another by agreeing to hold under him as general owner.[38]

Bailment is, then, the holding of possession of goods for some temporary purpose subordinate to the title of another who, as between the parties, has the right of possession whenever the bailment may be determined.[39] In general, any person is to be considered as a bailee who consents to hold possession of a thing of another upon an undertaking, express or implied, either to return the thing to him, or deliver it according to his authorization.[40]

70. **Acceptance of bailment.**—The duties and responsibilities of a bailee cannot be thrust upon one without his knowledge or consent. They must be voluntarily undertaken or assumed by the party to be charged, or by his agent duly authorized. This is illustrated in cases relating to the liability of a storekeeper for the loss of a customer's property. Wamser v. Browning, etc., Company is such a case.[41]

[38] Pollock & Wright, Possession, p. 134.
[39] Pulliam v. Burlingame, 81 Mo. 111, 51 Am. Rep. 229.
[40] Pollock & Wright, Possession, p. 163.
[41] 187 N. Y. 87, 79 N. E. 861, 10 L. R. A. (N. S.) 314.

Plaintiff visited defendant's store and purchased a vest. The clerk, being busy, told plaintiff where the vests were piled, and suggested that he select one and try it on. After the plaintiff had done so, he found that the contents of his own vest, a watch, pin, and cigar cutter, had been stolen. He brought suit for the loss of these valuables, but it was held that the plaintiff could not recover from the shopkeeper. The shopkeeper impliedly assumes charge of the goods as bailee, where the customer lays them aside temporarily at the request of the clerk and in his presence, in order that new garments may be tried on, and then he owes a duty of reasonable care. But in the absence of an invitation so to deposit goods, there is no implied undertaking to exercise care over property thus laid aside.[42]

The same principle is illustrated in another case, where a person at a depot turned his grips over to the porter of a hotel, and the porter put the grips in the hotel office. The owner of the grips did not become a guest, or procure accommodation at the hotel, and the clerk's attention was not called to the deposit of the grips. It was held that the acceptance of the chattel by the porter on behalf of the hotel was unauthorized and outside the real or apparent scope of his powers as a servant. He accordingly bound only himself as bailee, and not his employer. It was the same as if the porter had brought up the grip of a friend, or stranger, on his own account.[43]

[42] 20 Harvard Law Review 491.

[43] Tulane Hotel Co. v. Holohan, 112 Tenn. 214, 79 S. W. 113, 105 Am. St. Rep. 930.

71. **Adverse possession.**—Bailment is to be contrasted with certain transactions bearing some resemblance to it; among others, adverse or tortious possession, acquired either by unlawful taking or by conversion, not in subordination to another or with recognition of his title. Only where possession of chattels is lawfully and rightfully severed from the paramount ownership or title is there bailment. In the quasi-bailment of the tortious possessor, he must account absolutely for what he holds, as he is an offender against the rights of the owner.

72. **Custody.**—Bailment must be distinguished also from custody, as where a servant has the care of his master's goods or chattels in the master's or principal's name, and subject to his control, as a butler of plate, a shepherd of sheep, a clerk of merchandise,[44] and the like. The mere agent or servant has not any bailment, possession or qualified property right, but only the oversight or custody. The bailee holds possession in his own name, though subordinate to the title of another; the servant or agent holds custody in the name of his master. So of a person having the use of anything under the supervision and control of the owner: as a guest who has the use of furniture and plate at an inn, or a customer who is allowed to examine a watch under the present control of the shopkeeper; these generally have not possession, but mere custody under the present control of the actual possessor whose directions they are required to follow. The master is

[44] Bloss v. Holman, Owen 52 (Eng.), 1 Gray, Cases on Property (2nd ed.), p. 237.

alone regarded as being the possessor and the servant has the mere custody, except, by a peculiar anomaly of the criminal law, when he receives possession from some third person to hold a thing for his master; then he is held to possess as bailee until he has done some act by which the thing is appropriated to the master's use.[45] Suppose that the owner of a horse hires it out for a month to a customer who lends it to a friend, who sends out his servant to exercise it in the park. Here the owner's right to possess is suspended during the month and vested in the customer. The friend has the possession as a sub-bailee of the customer, while the servant has merely the custody.[46]

73. **Bailment or sale.**—The question whether there is a bailment or a sale is often a close one, particularly in the case of deposits in grain elevators. It may become a question of great importance, as in case of accidental destruction of the grain in the warehouse by fire or otherwise, without fault; if there is a bailment, the depositor is the loser; if a sale, the warehouseman must still pay for the goods. On the other hand, if the warehouseman should fail, the bailor could demand the goods back in specie; but if there is a sale, the depositor must share the assets with the general creditors.

Where articles are delivered to be manufactured, if the product of the identical grain, milk or other materials delivered is to be returned to the original owner in a new form, as in that of flour, cheese, etc.,

[45] Pollock & Wright on Possession, p. 60.
[46] See Pollock on Torts (8th ed.), p. 343.

it is a bailment, and the title does not vest in the manufacturer. But where there is no obligation to return the specific article, or its proceeds, and the receiver may pay the price or deliver another article of equal value in its place, it is a sale, and title vests in the manufacturer.[47]

74. **Elevator cases.**—The rules as to the deposit of grain in grain elevators and warehouses are somewhat exceptional. Grain is delivered to these warehouses in the usual course of dealing, with authority to the warehouseman to mingle the grain with the mass of grain of similar quality belonging to himself and others in the warehouse, and to add to and draw from the fluctuating mass on the order of the holders of warehouse receipts. The entire contents of the warehouse may change several times over; and yet, where it is the duty of the warehouseman to keep in his elevator sufficient grain to meet the outstanding receipts, the courts give effect to the intention of the parties that each depositor shall retain title as tenant in common of the mass contained in the warehouse to the extent of his contribution. The deposit is thus a bailment, and the warehouseman is a bailee to keep the grain, with power to change the bailor's ownership in severalty into a tenancy in common of a larger mass and back again; and with the continuous power of sale, substitution and resale.[48]

[47] Laflin & Rand Powder Co. v. Burkhardt, 97 U. S. 110; Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99; Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215; Savage v. Salem Mills Co., 48 Ore. 1, 85 Pac. 69, LEADING ILLUSTRATIVE CASES. Van Zile, Bailments and Carriers (2nd ed.), § 138.

[48] Williston, Sales, § 154; 35 Cyc. (Sales), p. 31.

So in the case of stock carried on margin by a stock broker, it is not necessary for the broker to retain or keep separate the identical stock purchased on his customer's order; but it is sufficient if he has on hand at all times an equal amount of the same stock which he can deliver, if required. After the purchase on his account, the customer becomes an equitable tenant in common of all the stock of that kind in the broker's hands, and the nature of the stock identifies the fund as fully as a grain elevator identifies grain for which receipts are out. The stock is deemed pledged to the broker as security for the unpaid balance of the purchase price.[49]

75. **Effect of option to buy or sell.**—In the case of grain elevators, it is generally held that where the warehouseman has the option to deliver the grain, or to sell it when the market is favorable and pay the market price on presentation of the warehouse receipt, the transaction is a sale and title passes in the absence of special circumstances showing that the parties intended a bailment.[50] But where the depositor has the option to demand a redelivery in kind, or to sell to the warehouseman, it is generally held to be a bailment up to the time that the option is exercised by the depositor.[51]

76. **Consignment or sale.**—If goods are delivered by A to B on consignment with authority in B to

[49] Richardson v. Shaw, 209 U. S. 365, 28 Sup. Ct. 512, 52 Law Ed. 835.

[50] Chase v. Washburn, 1 Oh. St. 244, 59 Am. Dec. 623; Savage v. Salem Mills Co., 48 Ore. 1, 85 Pac. 69, 10 A. & E. Ann. Cas. 1065, 1074, note, LEADING ILLUSTRATIVE CASES; but compare State v. Rieger, 59 Minn. 151, 60 N. W. 1087; 6 Harvard Law Review 450.

[51] Yockey v. Smith, 181 Ill. 564, 54 N. E. Rep. 1048; Ledyard v. Hibbard, 48 Mich. 421, 12 N. W. Rep. 637.

sell the goods in the course of his business, A to bear risk of loss and B to account for the proceeds of the sales, it is a bailment and not a sale.[52] This is so even though an invoice or bill for the wholesale price be sent to the consignee. In an Illinois case, one Fleet consigned furs to K & Co. to be handled and sold for his account, the proceeds to be held in trust and settlement to be made in 30, 60, and 90 days, as soon as the money might be collected. The goods were accompanied by invoices, in all of which they were described as being sent on consignment. It was held that the transaction was not a sale with the option of returning, but rather a bailment, and that K & Co. did not become indebted on receipt of the furs, but were agents for sale under duty to account for the proceeds. The risk of loss was, accordingly, on the consignor, and the property of the principal was not subject to levy and sale on execution by creditors of the agent.[53] The rule would be otherwise where the transaction was a consignment merely in form, but in reality a device to disguise an absolute sale and preserve a lien or security against other creditors.[54]

[52] Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99, 37 Law Ed. 1093.

[53] Fleet v. Hertz, 201 Ill. 594, 66 N. E. 858, 94 Am. St. Rep. 192.

[54] Dr. Miles Med. Co. v. John D. Park & Son Co., 220 U. S. 373, 55 L. Ed. 502.

CHAPTER XI.

RESPECTIVE PROPERTY RIGHTS AND INTERESTS OF BAILOR AND BAILEE.

77. **Possessory interest of the bailee.**—The present occupation, control and power of dealing with a thing is one of the important attributes of perfect ownership. In all these instances of bailment this possessory interest is severed from the ownership or general property and transferred from the bailor to the bailee, who is said to have a special property by virtue of his transient and qualified right of possession.

Yet this is not an absolute property or ownership because of the general property which the bailor still has left in him. Indeed, there is strictly no absolute property or ownership in either the bailor or the bailee, the person delivering, or him to whom it is delivered: for the bailor has only the future or reversionary right and not the immediate possession; the bailee has the possession, but only an interest of limited duration, perhaps altogether precarious and liable to be determined any moment at the will of the bailor. While no one enjoys absolute dominion or full ownership, and there is a qualified property in two persons, yet it is customary to speak of the bailor as the owner, though he has ceased to possess for a time, treating the potential and future as actually existent.

78. **Special property of bailee as against bailor.**—As between bailor and bailee, the possessory interest of the latter is a substantial right which exists and has advantages apart from the ultimate owner's general property. Whether the bailee has any special property right more extensive than the mere possession depends on the nature of the transaction: the gratuitous bailee (as in deposits, mandates, loans) would seem to have no higher right than possession and no right of detention as against the owner; while the bailee who has hired things for use and the pledgee who holds for security have a higher interest, something in the nature of an estate carved out of the general ownership. Thus, if a man hires a horse for a month, he has a qualified property during that period.

79. **Property rights of bailee as against strangers.**—We have seen heretofore that bare possession, even when wrongful and adverse to the true owner, is a title to protection against the world at large. And, on account of his possession, even the gratuitous bailee may maintain actions against such as injure or take away the chattels.[55] The tailor, the carrier, the innkeeper, the agisting farmer, the pawnbroker and the gratuitous bailee may all of them vindicate, in their own right, this their possession against any stranger or third person. Where the bailee has been dispossessed of the property by a stranger he may maintain trespass, trover, detinue, or replevin on the basis of his possession. Even a

[55] Booth v. Wilson, 1 B. & Ald. 59 (Eng.), 1 Gray, Cases on Property, p. 256.

wrongful possessor may recover full damages or the return of a specific thing from a stranger to the title on the strength of his bare possession.[56] As between bailee and stranger, a bailee is treated exactly as the owner and recovers the whole value or entire damage against the defendant, who cannot set up the right of a third person (*jus tertii*) unless he claims under it.[57] The bailee's possession gives him title against the world, though he is bound to account for damages which he recovers beyond his interest in the thing bailed to the general proprietor.

This rule by which a bailee, finder or wrongful possessor is permitted to sue and recover damages which he has not sustained, and by such recovery bar a subsequent action by the bailor for an injury to his general property without his consent, is criticized as unsound by certain authorities.[58] It is suggested that the general owner and the one having a special property should each bring an action for the actual loss or damage to his own particular interest. This might well be the rule where the person in possession does not claim complete title, or where the general owner does not consent to his recovering the total loss. Indeed, it is recognized that the mere naked bailee, at the will of the bailor, cannot recover against a third person for the conversion of

[56] Holmes, Common Law, pp. 166, 174, 211; Pollock on Torts (8th ed.), p. 369.

[57] The Winkfield (1902), P. 42; 1 Gray, Cases on Property, p. 270; overruling Claridge v. S. Tramway Co., (1892) 1 Q. B. 422 (Eng.), 1 Gray, Cases on Property, p. 268. U. P. R. R. v. Meyer, 76 Neb. 549, 107 N. W. 793, 14 A. & E. Ann. Cas. 634, note.

[58] 25 Harvard Law Review 655; 2 Beven, Negligence (3d ed.), p. 736, 737, note.

the bailed property, where the bailor or owner has intervened and asserted his general property. It is otherwise in the case of a bailee with the right of possession for a specific time and purpose, who has the right to recover to the extent of the value of his special interest in the property, even where the general owner intervenes.[59] It does seem strange that a bailee is entitled to recover for the entire damage done to property by its injury, loss, or misappropriation, while a joint owner of personal property who sues without joining the other co-owners is entitled to recover only his proportionate part of such damage.[60] But it is generally recognized that "the peace and order of society require that persons in possession of property, even without title, should be enabled to protect such possession by appropriate remedies against mere naked wrongdoers."[61] Thus the United States government in carrying on the postoffice is bailee of the letters and their contents for hire, and has sufficient interest to maintain an action of trespass or trover against a thief or wrongdoer for disturbing that possession like any other bailee, and may recover the entire value of the property.[62]

80. **Reversionary right of bailor.**—Under the old common law forms of action, a bailor could not bring an action of trespass, trover or detinue, these actions being founded upon a violation of possession

[59] Engel v. Scott & H. L. Co., 60 Minn. 39, 61 N. W. 825.

[60] Waggoner v. Snody, 98 Tex. 512, 85 S. W. 1134.

[61] Guttner v. Pacific, etc., Co., 96 Fed. 617, LEADING ILLUSTRATIVE CASES; 13 Harvard Law Review 411.

[62] Nat'l Surety Co. v. U. S., 129 Fed. 70, 73.

or upon an immediate right of possession.[63] Where any permanent injury is done to the chattel, however, the bailor may maintain an action on the case against a third party for the injury to his reversionary interest.[64] The bailor has also concurrent possessory remedies with the bailee if the bailment is revocable by him at his pleasure, as in the case of a gratuitous loan where the bailee has no vested interest or right to the beneficial use of the property, and possession is said to remain "constructively" in the owner.[65] In Ames v. Palmer,[66] it was held that where the defendant took the goods from a carrier which had a lien on them, the owner could, nevertheless, bring trover on the ground that the owner of the goods had the right to immediate possession as against a tort-feasor. This case seems somewhat inconsistent with the general rule that trover will not lie at the suit of the bailor against a third person, but it has been followed in certain jurisdictions.[67]

There is a conflict of authority as to whether, if a bailee or his servant contribute by negligence to the injury of the goods, so as to prevent recovery by the bailee from a third person, such contributory

[63] Wilby v. Bower, 1 Gray, Cases on Property (2nd ed.), p. 241; Wilson v. Martin, 40 N. H. 88, 1 Gray, Cases on Property (2nd ed.), p. 249; Gordon v. Harper, (1796) K. B., 7 T. R. 9 (Eng.), 1 Gray, Cases on Property (2nd ed.), p. 242.

[64] Hall v. Pickard, 3 Campbell 187 (Eng.), 1 Gray, Cases on Property (2nd ed.), p. 246; N. Y., etc., Ry. Co. v. N. J., etc., Ry. Co., 60 N. J. L. 338, 38 Atl. 828, LEADING ILLUSTRATIVE CASES.

[65] Lotan v. Cross, 2 Campbell 464 (Eng.), 1 Gray, Cases on Property (2nd ed.), p. 245.

[66] 42 Me. 197, 1 Gray, Cases on Property (2nd ed.), p. 246.

[67] Stowell v. Otis, 71 N. Y. 36.

negligence is imputable to the bailor so as to prevent a recovery by him. The owner is, of course, not liable for an injury to a stranger by the negligent use of an automobile or other property which he has loaned to a bailee, who has complete control of its operation.[68] It would accordingly seem to be the better view that a livery-stable keeper or other bailor would not be barred of his right to recover in case of injury to his reversionary interest by the contributory negligence of the hirer of the animal or other goods.[69]

81. **Termination of bailment.**—A gratuitous bailment is terminated by the death either of the bailor or the bailee, and the executors of persons who have borrowed things should return them. In any case, whether the bailment be gratuitous or for hire, on the accomplishment of the purpose for which it was made, the bailment comes to a natural end; and so where a bailment was for a fixed time, and the period has elapsed, no demand is necessary to give the bailor an immediate right to possession. In the case of a bailment for an indefinite time terminable at will, a demand by the bailor will ordinarily be necessary to terminate the bailment and support an action of trover if the property is not returned or accounted for.[70]

82. **Termination by conversion.**—A bailor may maintain an action of trover against the bailee, if by

[68] Hartley v. Miller, 163 Mich. 115, 130 N. W. 336, 33 L. R. A. (N. S.) 81.

[69] Gibson v. Bessemer, etc., Co., 226 Pa. 198, 75 Atl. 194, 27 L. R. A. (N. S.) 689. See also N. Y., etc., Ry. Co. v. N. J., etc., Ry. Co., 60 N. J. L. 338, 38 Atl. 828, LEADING ILLUSTRATIVE CASES.

[70] Shriner v. Meyer, 171 Ala. 112, 55 S. 156, Ann. Cas. 1913 A. 1103.

wrongful use or disposal of the goods the bailee has repudiated his obligations and thereby enabled the bailor to exercise the rights and remedies of a person entitled to possession. If a bailee misappropriates the property, as by selling or pledging it as his own, the bailor may immediately elect to treat the bailment as ended and bring trover for its value, or he may elect to treat the bailment as continuing and to sue for damages. A bailee, if he has any right of enjoyment or use, must use the thing in moderation, and not exceed the limits of the bailment. If his acts imply an assertion of title or right of dominion inconsistent with the bailor's ownership, this is a conversion of the property. Mere misuse, or unauthorized use of the thing bailed, without adverse claim, may only amount to a breach of obligation or a tort in the nature of waste falling short of conversion.

There is a difference of opinion between the American and English courts as to the effect of unauthorized sale or disposal of pledged property by a pledgee to terminate the bailment, and as to whether tender of the balance due is necessary as a condition of bringing an action of trover against the pledgee.

In Halliday v. Holgate,[71] a pledgee sold certain stock without the demand or notice required. The assignee in bankruptcy of the pledgor brought an action of trover to recover the value of the shares thus wrongfully disposed of, without having tendered any part of the debt secured. It was held,

[71] L. R. 3 Exch. 299 (Eng.).

confirming the decision in Donald v. Suckling,[72] that, assuming the sale to be wrongful, yet, as the immediate right to possession of the shares of stock was not by the sale revested in the plaintiff, he could not maintain trover, either for the whole value of the shares or for nominal damages, thereby substantially overruling the decision in Johnson v. Stear.[73]

The doctrine thus announced in England prevails in some of the states of this country. But by the general American rule, where the unauthorized sale or disposal of pledged stock or other property results in placing it beyond the power of the pledgee to restore it, the pledgor is not bound to pay or tender the amount of his debt before bringing suit against the pledgee for conversion. The effect of an unauthorized sale or disposal by a pledgee is to terminate the bailment and revest in the pledgor the immediate right to possession, thus dispensing with tender as a condition precedent to bringing trover for a conversion.[74]

[72] L. R. 1 Q. B. 585 (Eng.).

[73] 15 C. B. (N. S.) 330 (Eng.).

[74] Austin v. Vanderbilt, 48 Ore. 206, 85 Pac. 519, 6 L. R. A. (N. S.) 298; Mullen v. Quinlan & Co., 195 N. Y. 109, 87 N. E. 1078, 24 L. R. A. (N. S.) 511.

CHAPTER XII.

OBLIGATIONS OF BAILOR AND BAILEE ARISING FROM BAILMENT.

83. **Foundation of liability of bailee in tort or contract.**—Where the bailee is guilty of a culpable loss or injury of the goods in his care, the authorities generally hold that the bailor may bring an action either on the theory of tort or for breach of contract at his option.[75] Even in the case of gratuitous bailments, it is said that the modern theory of the bailee's liability is that of contract, and that the bailor's delivery of possession is the consideration for the bailee's promise to either keep or carry safely.[76] Since, however, the custody of the goods as a favor is a burden to the bailee and an advantage to the bailor, it would seem fictitious to speak of the delivery of possession as in reality a consideration. Some courts hold that the gratuitous bailee is liable only in tort and not in contract.[77] The true theory as to the source of the bailee's obligation to care for things intrusted to him would seem to be that of an obligation imposed by law, rather than either tort or contract. The acceptance of the goods by the bailee involves the assumption of an affirmative obligation to use diligence, which arises even without

[75] Nat'l Bank v. Graham, 100 U. S. 699.
[76] Pollock, Contracts (3d ed.), p. 194.
[77] Flint and P. M. Ry. Co. v. Weir, 37 Mich. 111, 26 Am. Rep. 499.

consideration where one takes charge of the goods of another as by finding, and enters into a relation where the owner must necessarily depend on the bailee to look out for his property. Oftentimes this obligation will partake of the nature of contract, as, in borrowing an article, the borrower impliedly agrees to return it; and the failure to perform this undertaking constitutes a breach of contract or obligation on account of which an action ex contractu may be maintained.[78] There is, however, no implied contract in the case of a gratuitous bailment by finding, but obligations will result from the bailee's undertaking to hold the property for the benefit of the bailor.[79]

84. **Duty of the bailor.**—It is the duty of a bailor lending a thing to another to disclose to the borrower any defects or vices known to him which may render the use of the thing dangerous or unprofitable to the borrower, as if a man loans to another a vicious horse. A mere lender is not liable for injury to a borrower arising from a latent defect unknown to him, but a letter of a bicycle or livery rig for hire is responsible for the exercise of at least ordinary care to ascertain defects in the thing hired, it being an implied obligation in the contract of hiring to supply a thing reasonably fit for the purpose intended.[80] We need not speak further of the duty of the bailor, as the duties and responsibilities of

[78] Tindall v. McCarthy, 44 S. C. 487, 22 S. E. 734; Chapman v. State, 104 Cal. 690, 38 Pac. 457.

[79] Beale, Gratuitous Undertakings, 5 Harvard Law Review 222; see also 27 Harvard Law Review 167, 168.

[80] Copeland v. Draper, 157 Mass. 558, 19 L. R. A. 283.

the bailee constitute, perhaps, the most important inquiry in the law of bailments, and to these we shall now direct our attention.

85. **Classification of bailments and measure of duty of the bailee.**—The modern classification of bailments is usually made with a view to facilitating the inquiry, what are the obligations, duties and responsibilities of the bailee toward the bailor in regard to property? This inquiry as to the measure of diligence owed by the bailee turns somewhat on the question whether the bailment is for the sole benefit of the bailor, or for the sole benefit of the bailee, or is put on a business basis for the mutual benefit of both parties. The law of bailments is given a somewhat foreign appearance by the coating of Latin names which are given to the various species of bailments, and which will be mentioned under the following classification. They were adopted by Lord Holt in the case of Coggs v. Bernard,[81] and have ever since continued in common use in our law.

There are, then, (1) bailments for the bailor's sole benefit, which include (a) the taking of a thing on deposit, such as a grip or package to be looked out for as a personal favor, known as *depositum;* (b) the taking charge of property to perform work upon it, or carry it from place to place without compensation, which is known as *mandatum;* in both of which species of bailments slight diligence is said to be exacted of the bailee, since one who takes charge of goods as a favor to another should ordi-

[81] 2 Lord Raymond 909 (Eng.); see § 67.

narily be held to the least degree of responsibility in regard to them.

Furthermore, there are (2) bailments for the bailee's sole benefit, of which the principal species is the gratuitous lending of a thing, like a bicycle, carriage or book, for the temporary accommodation of the borrower, known as *commodatum,* in which a high degree of care and diligence is said to be expected of the bailee.

Turning from gratuitous bailments as a favor to the bailee or bailor, to those which are put on a business basis, there are (3) bailments for mutual benefit or for hire, in which ordinary care and diligence is exacted from the bailee. This class includes various species: (a) the deposit of a thing in storage for a consideration, as in a warehouse, which is known as *locatio custodiae;* (b) the deposit of a thing to be repaired or worked upon, which is known as *locatio operis faciendi;* (c) the carriage of a thing for reward, which is known as *locatio operis mercium vehendarum;* (d) the letting and hiring out of a thing for a rental, as of a rig from a livery stable, which is known as *locatio rei;* (e) the pledge or deposit for security, as where a watch is pawned to a creditor to secure a debt, which is known as *pignus.*

There is a fourth class of bailments which may be termed (4) special or insurance bailments, where the bailee has a higher degree of responsibility than the law would ordinarily impose on the mere circumstance of a bailment per se, which responsibility results either (a) from special contract, or (b) is

imposed by law on considerations of public policy in connection with certain callings upon which the public is dependent, especially those of innkeepers and common carriers.

86. **Deposit.**—Deposit is a bailment by which a depositor places goods in the custody of a depositary to be kept or stored by him as a favor. The depositary must exercise at least slight care and skill such as a prudent man would use under the circumstances, to preserve the goods safely. If the bailee is to receive no compensation for his services and the bailment is solely for the benefit of the bailor, the jury are to be instructed that the law does not exact so high a degree of care as where the benefit is mutual, or entirely on the side of the bailee.[82]

In Preston v. Prather,[83] a bank received bonds as a special deposit for safe-keeping for the benefit of the owner without compensation. The bank employed a cashier who had free access to the vaults where the bonds and securities were deposited. He had been speculating heavily on the Board of Trade in Chicago, and this fact came to the notice of the bank directors. Nevertheless, they took no precautions and the cashier misappropriated the bonds and absconded. The case was carried to the Supreme Court of the United States, and the court held the bank liable. In the opinion it is said: "Undoubtedly, if the bonds were received by the defendants for safe-keeping without any compensation to them in any form, but exclusively for the benefit of the

[82] Hibernia Bldg. Assn. v. McGrath, 154 Pa. St. 296, 26 Atl. 377.
[83] 137 U. S. 604.

plaintiffs, the only obligation resting upon them was to exercise over the bonds such reasonable care as men of common prudence would usually bestow for the protection of their own property of a similar character. * * * The exercise of reasonable care is in all such cases a dictate of good faith."[84]

Degrees of diligence or negligence. It has been said that the gratuitous depositary cannot be held for loss or injury unless he is "grossly" negligent, but this statement of the law fails of universal approval. These degrees of diligence and negligence, "slight," "ordinary," and "great," used of the different classes of bailments, some courts would wish to see discarded and would judge of each case by its own complexion. It may be laid down as a general rule in all classes of bailments, in case of loss or damage to the property, that it is a question of fact for the jury whether under the circumstances of the particular case reasonable care was exercised by the bailee.[85] What it is fair and reasonable to expect from the bailee depends in part upon the circumstance of compensation, and in part upon the situation and nature of the property, and the risks to which it is exposed. The rules as to degrees of diligence or negligence are rather rough guides for a jury than strict rules of law. The true measure of the responsibility of the bailee is that he is bound to do that which his position as possessor of the prop-

[84] A depositary such as a bank would be liable for embezzlement of a special deposit by a cashier acting in the scope of his employment even if due care were used in his appointment, on principles of agency; though perhaps not, if the thief were a menial servant.

[85] Preston v. Prather, 137 U. S. 604.

erty makes it reasonable and just to expect of him. Gross negligence is nothing more than the failure to bestow that care which the property in its situation reasonably demands.[86]

"An example is stated by Pothier, to test the fidelity of a depositary. His house is on fire and he removes his own goods, and those of the bailor are burned; is he then responsible? He certainly is, if he had time to remove both. If he had not, Pothier then admits that a breach of faith cannot be imputed to him for having saved his own effects in preference to those of another intrusted to his keeping. But if the goods intrusted to him were much more valuable than his own, and as easily removable, then he ought to rescue the deposited goods."[87]

87. **Mandate.**—It is usually said that the gratuitous depositary must use at least slight care for the preservation of the thing deposited, and the same is true of the mandatary who undertakes some services about the thing put in his charge. The converse of slight diligence is gross negligence, but it is preferable to measure degrees of diligence owed as slight, ordinary and great; and then any neglect or omission of due diligence is a violation of legal duty, whether great or little. The courts, however, frequently speak of degrees of negligence.

In Tracy v. Wood,[88] the plaintiff intrusted to defendant, a money broker, a large number of gold coins to be carried gratuitously from New York to

[86] Compare Gray v. Merriam, 148 Ill. 179, 32 L. R. A. 769, 39 Am. St. Rep. 172.

[87] 2 Kent, Commentaries, p. 565.

[88] 3 Mason 132, Fed. Cas. No. 14130.

Boston. Defendant put the coins, which were in two bags, into a valise with money of his own, brought the valise in the evening aboard a steamboat which was to start the next morning, and left it in a berth in the forward cabin. He then went to a theatre, and on his return slept in the middle cabin. In the morning one of the bags was gone. Defendant left the valise on a table in the cabin for a few moments while he went on deck to send information of the loss to the plaintiff, the loss then being known to a large number of passengers. When he came back, the second bag was gone.

Story, Circuit Justice, in summing up the evidence, said:

"I agree to the law as laid down at the bar, that in case of bailees without reward, they are liable only for gross negligence. Such are depositaries, or persons receiving deposits without reward for their care; and mandataries, or persons receiving goods to carry from one place to another without reward. The latter is the predicament of the defendant. He undertook to carry the gold in question for the plaintiff, gratuitously, from New York to Boston, and he is not responsible unless he has been guilty of gross negligence. * * *

"The question is not whether he has omitted that care, which very prudent persons usually take of their own property, for the omission of that would be but slight negligence; nor whether he has omitted that care which prudent persons ordinarily take of their own property, for that would be but ordinary negligence; but whether there be a want of that

care, which men of good sense, however inattentive, usually take, or ought to be presumed to take of their own property, for that is gross negligence. * * *

"The present is a case of a mandatary of money. Such property is by all persons, negligent as well as prudent, guarded with much greater care than common property.

"The defendant is a broker. * * * He kept his own money in the same valise; and took no better care of it than of the plaintiff's. Still, if the jury are of opinion, that he omitted to take that reasonable care of the gold which bailees without reward in his situation usually take, or which he himself usually took of such property, under such circumstances, he has been guilty of gross negligence."

A distinction exists between nonfeasance and misfeasance, that is, between the total omission to do an act which one gratuitously promises to do, and culpable negligence in the execution of it. In the famous case of Coggs v. Bernard,[89] the defendant undertook gratis (free of charge) to carry several hogsheads of brandy from one cellar and deposit them in another, and he did it so negligently that one of the casks was staved and the brandy lost. The King's Bench held that the defendant was liable for misfeasance in the work which he had undertaken to perform, on the ground of his neglect and carelessness, though he was to have nothing for his trouble. Lord Holt admitted that if the agreement

[89] 2 Lord Raymond 909 (Eng.).

had been executory, to carry brandy at a future time, the defendant would not have been bound to carry it; but in the case before him, the defendant had actually entered upon the execution of the undertaking, and having done so, he was bound to use a degree of diligence and attention adequate to its proper performance.

88. **The loan of goods.**—The loan of goods is a bailment, whereby the lender allows another, the borrower, temporary possession and use of goods without compensation. The accommodation borrower of a chattel, as of a horse, a carriage or a book, must exercise great care for the preservation in safety and good condition of the thing lent, and is answerable for damages resulting from the least neglect, or deviation from the terms of the loan, as for example, going with a horse to a different destination from the one designated.[90] The borrower can use the goods only for such purposes as the lender might reasonably be understood to have consented to, and only for the time for which they were lent. He must not part with them to a third person without the consent of the lender and must restore them in as good condition as they were when received, reasonable wear and tear excepted, unless lost or damaged without his fault. The lender may at any time require the return of the goods, even though lent for a specified time and purpose. The borrower is not liable for the loss of a thing from the wrongful act of a third person which he could not foresee or prevent, as when he borrows a horse for a journey

[90] Scranton v. Baxter, 4 Sandf. 5 (N. Y.).

and is robbed of it without any neglect on his part. The borrower is, however, responsible for loss by inevitable accident if it occur during an unauthorized use of the goods, or after the time when he ought to have returned them.

89. **Letting and hiring and other bailments for mutual benefit.**—Letting and hiring is a contract whereby the letter allows another, the hirer, to use the goods for a limited time for an agreed rental. The letting of land is a lease, and besides establishing a contractual relation between the parties, results in conferring on the lessee an interest or estate for a specified time in the land. We have already seen that the hirer of a chattel is, as a bailee in possession, entitled to protection as against persons unlawfully disturbing his possession. In lettings where the bailee is to receive a consideration in the beneficial use of property, he is held to ordinary care, such as a prudent man might reasonably be expected to take of his own property. He is bound to restore the thing at the end of the hiring in the condition in which it was received, fair wear and tear excepted. A bailee for hire is not, however, an insurer of the thing bailed, and is excused from liability if the thing has been damaged or lost without neglect or fault on his part.[91]

It will not be necessary to speak in further detail of the different bailees for hire, although certain illustrations of their liability may be given. In the case of a wagon and contents left for hire in the keeping of a livery-stable keeper, the keeper

[91] Jaminet v. Am. Storage, etc., Co., 109 Mo. App. 257.

is a bailee for hire, like a warehouseman, bound to use ordinary care to protect the property from injury, such as would be exercised by a person of ordinary prudence; and in case the stable burns, he will be liable for the value of the wagon and its contents if they could have been saved by the exercise of ordinary care and exertion.[92] So a bath-house keeper is liable, as to apparel or valuables deposited by patrons with him for safe-keeping, for any loss or theft which could have been prevented by the exercise of ordinary care.[93] "While the customer pays nothing directly for the safe-keeping of his effects, the dealer receives his recompense in the profits of the trade to which the bailment is a necessary incident."[94]

90. **Deviation from the bailment.**—While any bailee for hire need exercise only ordinary business-like care and the diligence of a prudent man, if the hirer of domestic animals, or other bailee, depart from the terms of the bailment as by driving a horse to a place other than that mentioned in the contract of hire, he virtually becomes an insurer and absolutely liable for injury or loss occurring during such deviation or unauthorized use, even if it is not equivalent to a conversion.[95]

91. **Effect of special contract.**—Special contract may increase or diminish the usual responsibility

[92] Weick v. Dougherty, 28 Ky. L. Rep. 930, 90 S. W. 966.

[93] Walpert v. Bohan, 126 Ga. 532, 55 S. E. 181, 6 L. R. A. (N. S.) 828.

[94] Woodruff v. Painter, 150 Pa. St. 91, 16 L. R. A. 451; Sulpho-Saline Bath Co. v. Allen, 66 Neb. 295, 1 A. & E. Ann. Cas. 21.

[95] Palmer v. Mayo, 80 Conn. 353, 68 Atl. 369, 15 L. R. A. (N. S.) 428; McCurdy v. Wallblom Furn. & Carpet Co., 94 Minn. 326, 3 A. & E. Ann. Cas. 468, 470, note.

of the bailee imposed by law on the circumstance of voluntarily undertaking the bailment relation. A bailee may enlarge his responsibility and may agree absolutely to return the thing or its value, so as to become practically an insurer against all risks; or he may stipulate that the goods shall be at the risk of the bailor. It is sometimes a difficult question of construction to ascertain how far the parties have changed their common law liabilities. In a case where the bailee specially contracted to return a stallion hired in as good condition as when received or pay its value, the bailee was held liable as an insurer for the death of the stallion from disease, independent of negligence or fault on his part.[96] By the weight of authority, however, an absolute promise to return the property, without any promise to pay its value in event of failure to return, does not indicate an intention to enlarge the ordinary liability of the bailee. Thus in Young v. Leary,[97] a charterer of a ship contracted to "deliver back the ship in the same condition she now is in, ordinary wear and tear excepted." The vessel was burned without fault of the charterer and he was sued on the contract, the question being whether his obligation to deliver her back was absolute. It was held not, and that he was absolved by the fact that the vessel was destroyed without his fault. The language of the contract had created no greater obligation than that which the law ordinarily raises without any such

[96] Grady v. Schweinler, 16 N. D. 452, 113 N. W. 1031, 14 L. R. A. (N. S.) 1089, 15 A. & E. Ann. Cas. 161.

[97] 135 N. Y. 569, 32 N. E. 607.

promise. But in a California case,[98] a warehouseman received wheat for storage which he agreed to deliver upon surrender of receipt, "damage by the elements excepted." The wheat was destroyed before delivery by fire of incendiary origin. The warehouseman was held liable as on an absolute contract to deliver the wheat unless prevented by the "elements" (equivalent to act of God), and as fire of incendiary origin was not such a cause, it was held to be no defense to show that the wheat was burned without negligence on his part. On the other hand, an exemption clause releasing a warehouseman from liability for loss by fire does not include exemption from fire through the warehouseman's own negligence, and a similar construction is put on a storage agreement where goods are to be stored at "owners' risk," in spite of the argument that a warehouseman is no insurer and is only responsible for negligence in any event.[99]

92. **Estoppel of bailee.**—A bailee comes under an obligation of a contractual nature by accepting goods from the bailor, to return the bailed property at the termination of the bailment. He may be excused for non-performance of this obligation by showing that the property has been taken from him by valid process of law, or by a person having paramount title, or that it has been destroyed by accident without his fault. He cannot, however, excuse failure to return the goods bailed by any defects in the

[98] Pope v. Farmers', etc., Co., 130 Cal. 139, 62 Pac. 384, 53 L. R. A. 673.

[99] Gulf Compress Co. v. Harrington, 90 Ark. 256, 119 S. W. 249, 23 L. R. A. (N. S.) 1205.

bailor's title, even though the true title be in a third party, for the purpose of keeping the property for himself, nor in any case where he has not yielded to the paramount title.[1] The possession of a bailee is analogous to that of a tenant, who, having accepted the possession of land from another, is estopped to deny his landlord's title. The bailee must recognize the claim of the true owner with the right to possession at his peril. The bailee is, however, under duty to resist unlawful trespass or seizure of the property under void legal process, and must protect the property as he would his own. If taken from him, he should seek to reclaim it, and if he does not he may become liable for a conversion or negligent loss.[2]

93. **Burden of proof.**—The unexplained failure or refusal on the part of the bailee to return goods in proper condition is a prima facie case of negligence and puts the bailee under the necessity of rebutting this presumption of negligence if he would escape liability. While the authorities are in conflict, the modern rule places the duty on the bailee to explain the failure to make delivery of the thing bailed on proper demand, or its return in such a damaged condition as only culpable carelessness would probably have caused.[3] This is the more clearly so if suit is brought on theory of an affirmative contract to return and defendant seeks to ex-

[1] Jensen v. Eagle Ore Co., 47 Col. 306, 107 Pac. 259, 33 L. R. A. (N. S.) 681, note.

[2] Roberts v. Stuyvesant Safe Dep. Co., 123 N. Y. 57, 25 N. E. 294, 9 L. R. A. 438.

[3] Nutt v. Davison, 131 Pac. 390 (Col.).

cuse the non-performance of the obligation. If the action is in tort and the bailor alleges negligence as the basis of his right to recover, he must prove the facts on which he relies for recovery; yet much the same result is reached as in contract by saying that the loss of the goods is prima facie evidence of negligence.[4] This holds true where the circumstances of the non-delivery or the return in injured condition lead to an inference of negligence. If, however, it appears that the goods were lost by burglary, theft or fire, it is for plaintiff to establish that this was occasioned by some omission of due care on the part of the bailee. Defendant need not go further than to explain the loss as being due to an apparent accident such as fire in the first instance.[5] Thus the plaintiff's own showing that the loss resulted from such cause as fire may justify an inference that the thing was injured by misfortune or accident,[6] and no presumption of negligent loss will arise to furnish a prima facie case against the defendant.

[4] Sulpho-Saline Bath Co. v. Allen, 66 Neb. 295, 1 A. & E. Ann. Cas. 21, 23, note; Cumins v. Wood, 44 Ill. 416, 92 Am. Dec. 189.

[5] Claflin v. Meyer, 75 N. Y. 260.

[6] Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595. 14 L. R. A. 215.

CHAPTER XIII.

INSURANCE BAILMENTS—INNKEEPERS AND CARRIERS.

94. **Obligations of public callings.**—The common law has long regulated certain public callings by imposing obligations and duties upon those engaged in these pursuits, particularly upon common carriers and innkeepers, toward all those who desire to employ them. As Blackstone says: "If an innkeeper hangs out a sign and opens a house for travelers, there is an obligation imposed by law to entertain all persons who travel that way, and upon a breach of this universal obligation an action on the case will lie against him for damages, if he, without good reason, refuse to admit a traveler." So, a common carrier, such as a railroad, is bound to furnish reasonable facilities to all shippers who apply, and to serve them all without discrimination at reasonable rates. The business of public warehousing, particularly of grain, may be made a public calling and subject to regulation as such, although such warehousemen are not made, even by statute, to bear the liability of an insurer. These obligations incident to public callings, upon which the public depend for transportation, travel, and certain necessities of life, are imposed upon considerations of public policy and welfare.

95. **Common carriers.**—A common carrier is at common law virtually an insurer, absolutely liable

for loss of or damage to freight and packages committed to his care, except where it results from act of God, the public enemy, or fault of the shipper. An ordinary private carrier, employed specially to transport goods, on the other hand, is subject to the same degree of accountability as other bailees for hire, and would not be responsible for goods stolen or burned without his fault. It is a very important question, sometimes, to determine whether a railroad is holding freight or baggage awaiting delivery at its destination as a common carrier, or only as a warehouseman liable for ordinary negligence. According to some authorities, a railroad is a custodian and not an insurer from the moment of arrival; according to a second view, the railroad remains liable as a carrier until a reasonable time after arrival has elapsed for the consignee to call and take away the goods; according to a third view, which seems preferable, the carrier is liable as such until after reasonable notice of arrival and time to receive and take away the goods. The obligations of common carriers as bailees and otherwise are treated in another volume under the topic of Public Service Companies.

96. **Foundation of liability of innkeeper.**—The common law has, from an early date, imposed an extraordinary liability on innkeepers, making them virtually insurers of a guest's property left within the inn, except for losses due to act of God, or the public enemy, or the contributory negligence of the owner. The policy of the law has been to hold an innkeeper to the same extent as a common carrier,

and on similar grounds; his liability being a burden pertaining to the business wherein he is engaged, based on considerations of public policy, rather than an incident to a bailment or contract between the parties. This rule of strict liability comes down to us from the day when travel was done mostly on horseback and the highways were infested with robbers. The public inns were an essential part of the transportation system, and furnished necessary entertainment to the wayfarer and his beast overtaken by night. As Shakespeare describes it:

"The West yet glimmers with some streaks of day,
Now speeds the 'lated traveler apace
To gain the timely inn."

The traveler, thus compelled to repose confidence in a host, was protected by a stringent rule of liability on the part of the innkeeper, against depredation, theft, or fraud by collusion between his host and the numerous highway robbers.

97. **Modern measure of liability.**—The stringent common law rule still prevails in the majority of states, by which the innkeeper, like the common carrier, is an insurer of the goods, apparel, moneys, and beast or conveyance, of his guest which are placed within the protection of the inn (*infra hospitium*). This protection is incident to his undertaking to feed, lodge, and accommodate the guest for suitable reward. It is not necessary that the goods should have been delivered into the possession, or special keeping, of the innkeeper or his servants, in order to make him liable. If they be within the precincts of the inn it is sufficient to charge him. His re-

sponsibility extends, prima facie, to every part of the house or stables into which it is usual for property to be taken, and he is, therefore, liable for money stolen from a guest's trunk, which has been taken to his room.[7]

In Calye's case,[8] which contains much of the foundation of the law of the responsibilities of innkeepers toward their guests, it was held that if the guest direct that his horse be put to pasture and it be stolen, there is no liability; but if he do not so request and the innkeeper put the horse to pasture "of his own head," he shall answer if the horse be stolen.

An innkeeper may, by reasonable regulations, require the guest, if he means to hold the innkeeper to his responsibility, to deposit valuables in the hotel safe, leave the room locked, or comply with any other regulation that is just and reasonable. It is necessary, however, that the regulation be brought to the knowledge of the guest.

In case of loss, it is not necessary to prove negligence in the innkeeper, as he is bound to answer for all thefts, fires, losses, and damage happening even without his fault, unless they occur from act of God, or the public enemy, or by fault of the owner.

98. **Rule of prima facie liability.**—The harsh rule of the common law which makes an innkeeper responsible like a common carrier for all losses which occur, though without any fault of his, has been relaxed in a number of the states and also in England,

[7] Epps v. Hinds, 27 Miss. 657, 61 Am. Dec. 528.
[8] 8 Coke 32 (Eng.), 1 Smith Lead. Cas. (11th ed.), p. 119.

in view of the changes which have occurred in conditions of travel. A distinction is drawn between goods stolen and goods destroyed by fire for which the landlord is in no degree responsible.[9] According to the older view, the innkeeper is liable not only for theft, but for accidental fire, even if he used all possible diligence to preserve the property, unless the fire were caused by act of God, or superhuman agency such as lightning.[10] According to the so-called "rule of prima facie liability," while the innkeeper is held absolutely liable for loss of goods by robbery or theft from within the house, he is only prima facie liable for accidental fire, or the negligence of a third person, and may excuse himself by showing the loss to have been an unavoidable accident without fault or negligence on his part, though not caused by an act of God. The burden of proof is upon the innkeeper to show the circumstances of the loss and how the accident happened. Some courts even go to the extent of absolving the innkeeper from liability from loss by theft, if he can show that the theft happened without fault or negligence on the part of himself or his servants.[11]

99. **Relation of guest and innkeeper must exist.** —Under so extensive and exceptional a rule of liability, it becomes very important to determine who are innkeepers and guests, and when the relation between them exists. An inn may be defined as a

[9] Johnson v. Chadbourn Finance Co., 89 Minn. 310, 94 N. W. 874, 99 Am. St. Rep. 571.

[10] Hulett v. Swift, 33 N. Y. 571, 88 Am. Dec. 405.

[11] 22 Cyc. 1081.

house regularly kept open in the public business of furnishing entertainment and accommodation to travelers for compensation. It is to be contrasted with a lodging or boarding house, which is of a private nature, not open for the convenience of travelers, but where the patrons make a more or less regular abode.

A lodging, boarding, or rooming house, therefore, is not an inn because it is not intended for the accommodation of travelers. A restaurant is not an inn because it furnishes only food. An innkeeper, as to his permanent resident lodgers, is to be regarded rather as standing in the relation of boarding-house keeper than of innkeeper, under the special obligations owed to travelers. Hotel keepers thus frequently occupy a double capacity, being both innkeepers and boarding-house keepers. As innkeepers they entertain travelers and strangers as guests; as boarding-house keepers they receive residents and regular boarders. As to the goods of boarders the proprietor is responsible only for the want of reasonable care in their protection, like other bailees for hire.[12] It has been held that a nonresident who goes to a hotel which is run as a summer resort, for a short stay, paying board by the week, is a guest rather than a boarder and may hold the proprietor to the liability of an innkeeper.[13] By most authorities the furnishing of food as well as lodging is an essential characteristic of an inn;

[12] Coe v. Ricker, 101 N. E. 76 (Mass.); Taylor v. Downey, 104 Mich. 532, 29 L. R. A. 92.

[13] See Holstein v. Phillips, 146 N. C. 366, 59 S. E. 1037, 14 L. R. A. (N. S.) 475.

but some courts deny that furnishing meals is essential.[14]

The relation of innkeeper and guest is established when the traveler visits the inn or hotel to obtain food or lodging, though he goes merely for food during the day. The innkeeper may become responsible for the goods of the guest, even before the relation of host and guest is established, as where the intending guest gives his baggage to the porter of the hotel to be taken to the hotel. So, a traveler who is met at the door of an inn by a servant of the establishment to whom he delivers his grip and baggage is a guest from that time even though he does not register. If he goes to the dining room where he is served with food for which he pays, the innkeeper is responsible for his baggage.[15] On the other hand, one who goes to a hotel merely to pass the time and write letters without purchasing any accommodations, intending to spend "nothing but the evening with the hotel," does not become a guest, and the placing of his grips in the hotel is a gratuitous bailment by which the hotel is bound to use only slight care in the protection of his property, and is responsible only for gross neglect.[16]

100. **Illustrations.** — Suppose that a traveler comes to the hotel from a station to get a meal, and on entering the dining room hangs his valuable overcoat behind him on a peg. He finds when he has

[14] Nelson v. Johnson, 104 Minn. 440, 116 N. W. 828, 17 L. R. A. (N. S.) 1259, note.

[15] Memphis Hotel Co. v. Hill, 136 S. W. 997 (Tenn.), 34 L. R. A. (N. S.) 420. See also Tulane Hotel Co. v. Holohan, 105 Am. St. Rep. 930.

[16] Baker v. Bailey, 145 S. W. 532 (Ark.), 39 L. R. A. (N. S.) 1085.

finished his meal and is about to leave that his coat is missing or damaged. Here there is sufficient evidence to establish the relation of innkeeper and guest, so as to make the hotel proprietor liable for the loss without proof of negligence on the defendant's part.[17] On the other hand, if one, whether a traveler or not, enters a restaurant, not a part of a hotel, and hands his hat and coat to a waiter or an attendant who hangs them up or disposes of them in a cloakroom, and they disappear, this is evidence that the restaurant keeper is a bailee, and he is liable for injury or loss only through negligence or lack of due diligence while the coat was under his care.[18] Thus, if the place visited be not an inn, or the relationship of innkeeper and guest did not arise, the customer must show an actual bailment. If he hangs up the coat himself, instead of delivering it to a servant, this might be difficult to show, as bailment involves a delivery and an acceptance, and a person cannot be made liable as a bailee without his consent.[19] So, it would be doubtful whether a customer in a barber shop could recover from the proprietor for the loss of a hat or overcoat, taken from a peg near the door by some person on leaving the shop, especially if a check room were provided for the safe-keeping of apparel of patrons, and there were no invitation, express or implied, on the part of the proprietor, to leave things elsewhere.

101. **For what goods liable.**—There are two different views in regard to what property is covered

[17] Orchard v. Bush & Co., 2 Q. B. 284 (Eng.).

[18] Ultzen v. Nicols, (1894) 1 Q. B. 92 (Eng.).

[19] La Salle Restaurant & Oyster House v. McMasters, 85 Ill. App. 677.

by the innkeeper's liability. According to one view, he is liable for all the goods brought by a guest and received within the inn; according to the other, his responsibility is limited to "baggage," goods which are reasonable and necessary accessories of travel. Where property is brought to a hotel for sale or show, as in the case of samples of commercial travelers, the law does not hold the innkeeper to his strict liability, but only to the exercise of ordinary care.[20]

102. **Contributory negligence.** — Contributory negligence on the part of a guest will excuse the prima facie liability of an innkeeper for the loss of property. The question often arises how far it is negligence for a guest to fail to bolt or lock his door. According to some decisions, a failure to do so is not necessarily negligence, but is a fact to be considered by a jury as one of the circumstances of the case.[21]

103. **Termination of innkeeper's liability.**—The innkeeper's liability as such continues even though the guest is temporarily absent. As to effects left on the premises after a guest's departure from the hotel, the innkeeper's liability continues for a reasonable time in which to remove the goods. It does not cease the very instant the guest pays his bill, but after a time the innkeeper is only liable for goods left in his charge as a gratuitous bailee.[22]

[20] Williams v. Norvell, etc., Co., 116 Pac. 786 (Okla.), 35 L. R. A. (N. S.) 350; Fisher v. Kelsey, 121 U. S. 383.

[21] Spring v. Hagar, 145 Mass. 186, 13 N. E. 479.

[22] Oxford Hotel Co. v. Lind, 47 Col. 57, 107 Pac. 222, 28 L. R. A. (N. S.) 495.

104. **Liability of boarding-house keeper for care of goods of boarders.**—In a recent Massachusetts case,[28] plaintiff brought an action to recover the value of certain jewelry placed in the safe of the defendant, a summer-hotel keeper with whom the plaintiff boarded. It was held, in accordance with certain English authorities, to be the duty of the boarding-house keeper to take reasonable care for the safety of property brought to the house by a boarder. The landlord of a boarding house is neither an insurer nor a gratuitous bailee, but is a bailee for a consideration which is included in the board, and under an obligation to use reasonable diligence for the protection of goods of boarders, particularly as to articles directly left under his charge.

105. **Co-tenancy and other modifications of ownership.**—We have now concluded our survey of the nature and incidents of bailments, which involve the separation of possession from ownership. Other "estates," interests, or subdivisions of complete ownership in chattels may be referred to but briefly here.

Personal property may belong to two or more persons concurrently in joint tenancy or tenancy in common as well as real property. The different forms and incidents of co-ownership will be treated more fully in connection with the law of land. The right of survivorship is the great characteristic of property vested in joint owners as distinguished from tenants in common. Although joint tenants

[28] Coe v. Ricker, 101 N. E. 76 (Mass.).

are equally owners, when one joint tenant drops out of the group by death, the survivors take his share, so that the longest-lived tenant takes the whole in severalty. The interest of a joint tenant, therefore, cannot be transferred by will, nor does it pass at his death to his executors or administrators, but accrues to his co-owners.

The law, however, recognizes the right of a joint owner to transfer his undivided share inter vivos to another, and by such transfer the unity of title and the right of survivorship in the other tenants are defeated, and the new holder becomes a tenant in common with the other part-owners, so that if he dies, his interest will go to his executor or administrator for the benefit of his creditors, legatees, or next of kin. So, also, if personal property be used in a joint undertaking by way of partnership in trade, there can plainly be no right of survivorship to the exclusion of the estate of a deceased partner.

Tenancy in common is co-ownership of undivided shares in some article or mass of property. The shares may be equal or unequal and may be transferred by their holders. Apart from survivorship the incidents of joint and common ownership are quite similar. Each co-tenant has a right of possession of the common property, and consequently is guilty of no wrong in getting and holding possession even though he thereby excludes his co-owner from all beneficial enjoyment. Where the article is indivisible like a horse or cow, the doctrine gives the actual possessor an unjust monopoly of posses-

sion which can be remedied only by a partition by sale and a division of the proceeds. A right to a partition exists at common law when the property is naturally divisible, as in case of such commodities as grain, logs, or a number of cattle, separable by number, weight or measure.[24] Refusal to permit such a division is a conversion. One tenant in common may rightfully take away his share of a divisible mass without the intervention of a court to make division.[25] A tenant in common may bring trover against a co-tenant for conversion in case of destruction, misuse, or sale of the whole chattel, or any exercise of absolute dominion inconsistent with his rights as co-tenant, as by wrenching machinery from a mill and carrying it away.[26]

Other modifications of absolute ownership include the creation of future interests, as when one, by deed or will, limits his books or furniture to A for life, with remainder over to B. The law on this subject is in some uncertainty, although there seems no reason why such interests should not be created in personal property after the manner of reversions, remainders, and executory interests in real property, unless the use of the property by the particular tenant involves its entire consumption. The division of ownership between creditor and debtor for purposes of security will be considered elsewhere under the topics of Liens, Pledges, and Chattel Mortgages.

[24] Schouler, Personal Property (3rd ed.), § 165.
[25] Pickering v. Moore, 67 N. H. 533, 32 Atl. 828.
[26] Waller v. Bowling, 108 N. C. 289, 12 S. E. 990, 12 L. R. A. 261, note.

BIBLIOGRAPHY.

Schouler, The Law of Personal Property, 1907, 2 volumes; *Goodeve,* Modern Law of Personal Property (5th ed.); *Williams* on Personal Property (16th ed.), 1906; *Hale* on Bailments and Carriers; *Van Zile,* Bailments and Carriers (2nd ed.); *Schouler,* The Law of Bailments, including Pledges, Innkeepers, and Carriers (student's ed.), 1905; *Beale* on Innkeepers and Hotels.

LAW OF LIENS AND PLEDGES

BY

ROBERT LLEWELLYN HENRY, JR., J.D., B.C.L.*

CHAPTER I.

DEFINITION AND CLASSIFICATION.

1. **Definition.**—A lien is a right which entitles the possessor to a hold on specific property. Such property is a security for his claim, and to it he has a right superior to the rights of general creditors and of others whose claims to the property arise subsequent to his lien. Such property may be applied to the satisfaction of the debt of the lien holder. The importance of such a right is not easily overestimated. Whenever a debtor becomes insolvent or bankrupt and is unable to pay his debts in full, the holder of a lien is protected, while other creditors may get only a fraction of their claims or nothing at all.

2. **Liens and pledges distinguished.**—This article is to treat of pledges as well as of liens. In the definition given above, pledges are included. In a broad

* Dean of College of Law, University of North Dakota; formerly of the law faculty of the Louisiana State University and of the University of Illinois.

sense of the word, pledges are liens, but in a narrow sense, they should be distinguished. A pledge is a deposit of personal property as security. Property is placed by the owner, who becomes the pledgor, in the hands of another, the pledgee, with the understanding that the latter may hold it until a certain debt is paid or obligation is performed, and upon default the pledgee is to have the right to sell the property in order to satisfy his claim. Common examples are the borrowing of money from a bank by a deposit of securities, or from a pawnbroker on delivering to him the possession of certain valuables. A pledge always arises by contract, a lien is generally implied by law. Only personal property can be pledged. There may be liens over realty as well as over personalty. A pledge carries with it the right to sell the property; a lien does not. While then liens and pledges are similar in nature and in many of their incidents, the latter will receive separate treatment as to matters in respect to which there is a difference.

3. **Liens and mortgages distinguished.**—The modern mortgage might very properly be classified as a lien and could come within the above definition. Historically, however, mortgages were of a different nature. They were more than merely rights over certain property as security. They were transfers or conveyances of property upon condition. In order to secure a debt the title of land or personalty was vested in the lender and was to come back to the borrower upon payment at the stipulated time. In about half of the United States the original the-

ory is preserved. Such states are known as title jurisdictions. In the other states, generally speaking the newer ones, the old title theory has been abandoned and mortgages are considered liens. However, the law as to mortgages in title jurisdictions and in lien jurisdictions has more points of similarity than of difference. It is absolutely essential even for those in lien states to understand title mortgages and their history. There are many incidents also of mortgages which are peculiar to them, and which do not concern other liens. It is advisable, therefore, in spite of the fact that mortgages have undergone a development which has gone far to assimilate them to liens, to treat them separately, and no further reference will be made to them in this article even as to those states in which mortgages are liens in theory as well as in fact. While then logically the law of real security, meaning by that security over property real or personal, as distinguished from personal in which an obligation is secured by a person, such as a surety, includes mortgages, pledges, and other liens, only pledges and liens in the narrow sense are here considered. Briefly, at least in title jurisdictions, a main distinction is that the title passes to a mortgagee; while it always remains in the person making a pledge or in him over whose property a lien is acquired.

4. **Creation of liens and capacity of parties.**—A lien may be created by contract or may arise by rule of law. It is a right in or over property which comes into being in connection with a contract or

with an obligation of a contractual nature. It may well be that the parties did not actually contemplate a lien. But, as in many other cases in the law, certain obligations are considered implied terms of certain contracts or certain relationships, unless the parties expressly stipulate otherwise; so it is with liens. Certain liens may be conceived of either as implied terms in contracts, or as rights attached by rule of law to certain relationships, the latter conception, perhaps, better covering some cases. If a lien arises by rule of law, it is at most a conditional right and does not come into operation until the time at which the act to be secured ought to be performed. But by contract, express or implied in fact, a lien may be created to take effect immediately as security for the performance of obligations not now in existence. Where an attempt is made to create a lien by express contract the usual rules as to contractual capacity apply, but where it arises by operation of law it can plainly be seen that it may affect property of persons not of full capacity.

5. **Subject matter of liens.**—Any property, real or personal, may be the subject matter of a lien, though, as will be seen later on, certain kinds of liens may attach to certain kinds of property only. As in the case of sales and mortgages, only property in existence or potentially so can be subject to a lien, and property not owned by the person attempting to give a lien cannot, with certain exceptions to be hereafter noted, be bound. But there is no reason, as no question of the passing of title

to property as in the case of sales or mortgages is involved, why, if a lien is attempted to be given on property not yet in existence or not yet acquired, the lien should not attach immediately upon the property coming into existence or into the ownership of the person purporting to give the lien, provided the other circumstances for the acquisition of the particular lien in question are present. In a number of states there are code or statutory provisions limiting the right to give liens on future interests, as prohibitions against liens on wages to be earned or crops to be grown.

6. **Liens are accessory rights.**—A lien is an accessory right. It cannot stand by itself. It is security for some other right, rises to protect such right and falls with it. When the debt is paid or the act performed the lien is gone.[1]

By express agreement a lien may be created to secure the debt of a third party. Or by a rule of law the owner may find his property burdened with an obligation created by another without the owner's consent. For example, the common law gives an innkeeper a lien on a guest's baggage although it may turn out to belong to a third person. The owner of the goods does not owe the hotel bill, but he cannot get his property without paying it. In fact the existence of a lien does not necessarily imply that any person is bound to perform the act for which the lien is security. A lien is not a personal obligation itself, nor need such an obligation accompany it. For instance, a statute may give a lien to

[1] Faber v. Wagner, 10 N. D. 287, 86 N. W. 963.

a person who picks up an animal wandering on the highway, and who feeds and takes care of him. But suppose the expenses of caring for such animal exceed its value. The finder cannot hold the owner for the excess nor for any amount in case the owner desires to abandon the animal. The only remedy of the finder in such a case is to take advantage of the statutory provisions authorizing a sale after certain formalities such as advertisement, and in that way to recover as much as the animal will bring. The right to which the lien is accessory in this case is the statutory right to compensation for the services rendered, provided the owner claims the animal.

7. **Liens protect particular obligations.**—It may seem superfluous to some readers to call attention here to certain fundamental conceptions which if not already understood could hardly be missed in a study of liens, but mention of them now may add clarity to the discussion and may prevent erroneous ideas from being formed. We are all familiar with the layman who thinks if he has goods belonging to someone else in his possession and the person to whom they belong owes him something, that, no matter what the nature of the claim, he has a right to hold the goods until his claim is paid. And students of the law even who have given the subject of liens only a superficial consideration have been known to possess the notion, on account of the great variety of liens, that a person can get a lien on almost any property of his debtor that he can lay his hands on, for almost any claim. Such ideas are very

far from the law. If such were the case it would be unnecessary to enumerate the different kinds of liens and to explain by whom, for what claims, and over what property, they may be acquired. For instance, persons of a certain class, say shoemakers, may be accorded by law the right to acquire liens. It does not follow that a shoemaker has a right to hold a pair of shoes brought to him to repair for any claim he may have against such customer. The claim must be for repairing shoes of the customer, in fact for charges on the very pair of shoes which the shoemaker holds. Then assuming the claim is for repairing the customer's shoes which are still in the shop, the shoemaker would have no lien on an umbrella left by the customer at the shop. His lien is on shoes only.

In each case it is necessary to ascertain how the law defines the class of persons entitled to the lien, the charges protected by it, and the property subject to it. Generally speaking, it will be found that the claims protected have reference to the occupation of the person given the lien, and the property which may be subjected to the lien is that upon which the services are rendered or is in some way connected with those services. But a knowledge of the general plan upon which liens are constructed does not do away with the necessity of considering the several requisite elements in each different lien.

8. **Division of subject.**—Thus far, in this article, the general nature and common characteristics of liens have been considered. After a classification of liens which will be a key to the order of treat-

ment, the different kinds of liens, of which there are a great number, will next be taken up. They differ from each other chiefly in respect to the persons entitled to obtain them, the charges for which they may be had, the property which may be subjected to them, and the method of their acquisition. These matters will be considered in Chapters II to IV. In Chapter V the rights of the parties, i.e., the person over whose property the lien is acquired and the person holding the lien subsequent to the time of acquisition, will be taken up. While there are certain differences as to such rights, particularly in the method of enforcement, yet with respect to them, liens of all kinds may be advantageously treated together with such groupings as may be conducive to fixing the differences in mind.

9. **Classification.**—Liens may be divided into those which may be acquired in personal property, those which may cover either real or personal property or both, and those which can bind only real property. Those which may attach to personal property can be separated into two classes, those based on possession and those not so dependent. Again liens are classified according to their origin. Those developed by the courts of common law are called common law liens; those which arise in the courts of chancery, equitable liens; those created by statute, statutory liens; and those which are enforced in the courts of admiralty, maritime liens. As each of these four groups has certain characteristics peculiar to itself, it is useful to preserve the classification. If one uses both of the above prin-

ciples as our primary basis of division, we have the following headings which will be treated in the order given: (1) common law liens, including pledges, and statutory liens on personal property based on possession and modeled upon common law liens; (2) statutory liens on personal property which are not dependent on possession, and maritime liens; (3) equitable liens which may exist on either real or personal property or on both; and (4) statutory liens on land. The two latter, on account of the brief treatment accorded them, are considered in the same chapter.

Specific and general liens. Another classification is into general and special or specific. A general lien is one which gives a right to hold certain property for all claims of a certain class. For instance, a lawyer is permitted to hold all papers of his client in his possession until he is paid for all the professional services rendered to such client. A specific lien, on the other hand, gives the holder security only for the specific services performed upon such property. A common carrier has a specific lien for his charges. Suppose he transports one article for a person and gives it up without exacting his charges. Later another piece of property is given to him for transportation by the same person. He cannot hold such property for his charges for the first article, but only for the charges due with reference to the one then in his possession. This basis of classification is made use of, where applicable, for grouping the different liens within the main headings.

CHAPTER II.

COMMON LAW LIENS AND STATUTORY LIENS BASED ON POSSESSION.

10. **Chief characteristics.**—Common law liens are based on possession, i. e., without possession of the property on the part of the person claiming the lien or by some one in his behalf there can be no common law lien, and a lien of this class after being acquired is lost by a loss of possession. In other words, a common law lien is a right to detain property until certain claims are paid. Such liens can exist only on personal property. Equitable and statutory liens, on the other hand, are not necessarily based on possession and may exist upon real as well as upon personal property.

Statutory liens on personal property which are based on possession are similar to common law liens and are modeled after that class. For the most part they merely extend common law liens to include certain persons and transactions closely related to those protected by common law liens. Again in some states liens of common law origin have been made statutory, perhaps with some modifications of the common law. It is desirable to treat such statutory liens with common law liens.

The liens considered in this chapter are generally implied, though they may be expressly stipulated for. On the other hand, it may be agreed that no

lien shall attach and an understanding to that effect may be implied from the terms of the contract. For instance, in the case of Morrill v. Morrill,[2] a physician rendered services to one member of a firm in consideration of the firm's agreement to repair his sleigh and to charge the expense to the partner. It was held that the firm could not retain the sleigh for the repair charges.

11. **Classes of common law liens.**—There are three groups usually made of liens of common law origin, classified according to the reasons which caused their recognition. They are: liens based upon a public calling; liens given for improvement by skill and labor; and liens based upon mercantile custom. For convenience a fourth heading is made—liens acquired as a result of legal proceedings. They are of both common law and statutory origin, but may be advantageously treated here. A fifth heading considers vendor's liens on personal property. They are certainly of common law origin, but commonly are taken up in connection with the law of sales. They are covered briefly here for the sake of completeness. Pledges, though they are commonly looked upon as transactions of a nature distinct from other liens, will be considered as the sixth class of common law liens.

12. **Liens based on public callings.**—Persons engaged in public callings, such as common carriers, are placed by law under certain heavy burdens. For instance, a common carrier is obliged to serve the public without unreasonable discrimination and is

[2] 64 N. H. 71, 6 Atl. 602.

practically an insurer of goods transported. In compensation for such obligations the party performing the public service is given certain rights, namely, liens on property in his possession as security for the charges for services performed. All of the liens in this class are special, not general. For the distinction, see § 9.

Common carriers. A common carrier is one who holds himself out to the public as willing to transport goods. He differs from a private carrier in that the latter does not contemplate serving the public generally. A common carrier is engaged in a public calling and the law attaches certain rights and obligations to such calling. Among his rights is the one to retain possession of property entrusted to him for transportation until his charges for such services are paid. The carrier's lien has been long recognized by the common law. An old English case so holding is Rushforth v. Hadfield.[3] There are numerous American cases to the same effect.[4] The carrier's lien is special, that is, goods can only be retained for the charges upon them, and not for charges on other goods, possession of which has been parted with.[5] It is generally held that a carrier has no lien on goods given to him without authority of the owner. For a further discussion of this point, see § 27.

Warehouseman's liens. A warehouseman also has a common law lien on the goods in his custody. The

[3] 6 East 519 (Eng.), LEADING ILLUSTRATIVE CASES.
[4] Galena & Chicago Union Railroad v. Rae, 18 Ill. 488, 68 Am. Dec. 574.
[5] Hartshorne v. Johnson, 7 N. J. Law (2 Halst.) 108.

rule applies only to public warehousemen, i. e., those whose business it is to store goods for the public. It is true a warehouseman is not under such heavy obligations as a common carrier, but his business is one affected with a public interest, and he is given a lien similar to that of a carrier. It is specific, not general.[6]

13. **Same subject—Further illustrations.**—*Innkeeper's liens.* An innkeeper is one who holds himself out as one willing to furnish accommodation, room, food, etc., to travelers and to all other persons able to pay and in a fit condition to be received, who present themselves. The persons to whom innkeepers are under special obligations, and as to whom they have certain rights, are known as guests. An innkeeper has a specific lien over the baggage of guests brought to his hotel or inn.[7] He is given the lien because he is under an obligation to serve the public. It covers the whole amount of the guest's bill, but baggage cannot be retained for former accounts. This lien also gives the innkeeper the right to hold goods of a third person brought to the inn by a guest. This matter is more fully discussed under the heading "Liens given by persons other than owner." (§§ 25-27.)

Boarding and lodging house keepers. Under the common law persons keeping boarding and lodging houses were not entitled to liens on the baggage of their boarders or lodgers.[8] They are not engaged

[6] Low v. Martin, 18 Ill. 286, LEADING ILLUSTRATIVE CASES.

[7] Singer Mfg. Co. v. Miller, 52 Minn. 516, 55 N. W. 56, 38 Am. St. Rep. 568, 21 L. R. A. 229, LEADING ILLUSTRATIVE CASES.

[8] Hursh v. Byers, 29 Mo. 469.

in entertaining strangers and are at liberty to deal with whom they choose, and by special contract. It should perhaps be stated that hotel keepers are also not entitled to a lien on the baggage of persons whom they accommodate if such persons have entered into a special contract with them. In other words, the lien is given only when the technical relationship of innkeeper and guest exists. But by statute in many states, keepers of boarding houses, and in some, of lodging houses, are given liens like those of innkeepers. For the scope of the several statutes they must be individually inspected. The statutes, generally, do not protect restaurant keepers and under the common law they have no liens.

14. **Liens given for improvement by skill and labor.**—Under the common law, when property is intrusted to a workman for the purpose of improving it by his skill or labor, such workman acquires a lien upon it for his charges.[9] It covers only the charges for such improvement and is a specific[10] lien on the goods enhanced in value. For example, the wheelwright who repairs a wagon, and the person to whom tobacco is given to be manufactured into cigars are entitled to liens of this class. A distinction was drawn in the early cases between those in which there were express agreements to pay stipulated prices and those in which agreements had to be implied for the payment of reasonable sums, the latter being protected by liens and the former not.

[9] White v. Smith, 15 Vroom 105 (N. J.), 44 N. J. L. 105, 43 Am. Rep. 347, LEADING ILLUSTRATIVE CASES.

[10] Mathias v. Sellers, 86 Penn. St. 486, 27 Am. Rep. 723, LEADING ILLUSTRATIVE CASES.

It is now well settled, however, that there is no longer any such distinction in the law.

This lien rests on immemorial custom. It was perhaps felt that mechanics and artisans were engaged in public callings. At any rate they had frequent dealings with strangers concerning whose credit they knew nothing. Many of them were travelers whom they would not again see. The workmen could not adequately be protected except by giving them the right to hold the property on which they had expended their labor, until such services were paid for. Again the sums involved were generally small and the persons to whom they were due, poor; so that actions at law to enforce such rights were not practical remedies.

15. **Agistors and livery stable keepers.**—An agistor is one who takes cattle, horses, pigs, or sheep upon his land for pasturage. The common law did not accord agistors[11] or livery stable keepers[12] the right to hold the animals in their keeping for their charges. The reason given by the cases for not allowing liens to such persons is that they do not enhance the value of the animals. But the trainer of a race horse was allowed such a lien[13] on the ground that he added to the value of the horse. The reason given for the distinction has been severely criticized. It is difficult to see why a person who feeds a horse does not add to its value, and the rule

[11] Tandy v. Elmore-Cooper Live Stock Commission Co., 113 Mo. App. 409, 87 S. W. 614.

[12] Wallace v. Woodgate, 1 C. & P. 575 (Eng.), 12 Eng. C. L. 328.

[13] Bevan v. Waters, 3 C. & P. 520 (Eng.), 14 Eng. C. L. 692, LEADING ILLUSTRATIVE CASES.

itself denying the lien has been felt to be unjust. The latter consideration has given rise to statutes in many states, according liens to agistors and to livery stable keepers.

16. **Liens of finders.**—*At common law.* The common law gave no lien to finders of lost goods.[14] There could be no contract, express or implied, binding the owner to pay for the services of the finder, and it is contrary to the spirit of our law to make one for the parties. But, even assuming a contract implied by law, a finder could not be brought, it was thought, within the skill and improvement class, for he has not added to the value of the property. Also, the courts explained the exclusion of finders on the grounds of policy. There was no method of determining the amount of compensation. The balance of convenience is against compelling the owner to offer the finder a sufficient sum at the hazard of being non-suited in an action of trover; and also if finders were by law entitled to rewards it would offer a great temptation to designing persons to place property of others in such situations that they might claim to have found it, for example, by letting out animals upon the highways, or by setting lumber adrift.

In courts of admiralty, salvage is allowed for the rescuing of boats and cargo from the perils of the sea, and a maritime lien is given for its protection, but such is not the common law. In the case of Nicholson v. Chapman, above cited, it was held

[14] Nicholson v. Chapman, 2 H. Black. 254 (Eng.), 126 Reprint 536, LEADING ILLUSTRATIVE CASES.

that where timber was accidentally afloat, a person picking it up was not entitled to a reward or to a lien upon it. There is a case,[15] and several dicta to the effect that while the finder is not entitled to a reward, nor to a lien, he may at least recover for his necessary expenses. The case so holding was for saving and repairing a boat found adrift on tide water, a situation which might have entitled the rescuer to salvage in a court of admiralty. It can hardly be said, therefore, that the law is settled that a finder has at common law an action even for the trouble and expense to which he has been put.

17. **Same subject—Offers of rewards.**—But if the owner of property offers a reward for its return, the finder is entitled to a lien to secure the payment of the reward. In the case of Wood v. Pierson[16] a reward of $25 was offered for the return of a diamond pin. It was held that the finder could keep it until paid the reward. However, the offer must be to pay a definite sum. Where a liberal reward was offered it was held that the offerer was the judge of the liberality and that the finder had no lien.[17]

Estrays and animals taken damage-feasant. An estray is an animal found wandering upon the highway whose owner is unknown. Estrays belonged to the king or his grantees after they had been "proclaimed in the church and two market towns next adjoining to the place where they are found; and then if no man claims them, after proclamation and

[15] Chase v. Corcoran, 106 Mass. 286.
[16] 45 Mich. 313, 7 N. W. 888, LEADING ILLUSTRATIVE CASES.
[17] Wilson v. Guyton, 8 Gill. 213 (Md.).

a year and a day passed."[18] If the owner claimed the estray within a year and a day he had to pay the charges of finding, keeping, and proclaiming before he was entitled to his animal. Cattle and other animals taken damage-feasant, i. e., causing damage. could be distrained until the owner paid for the damage done.[19]

Statutory provisions. In many states there are statutes giving liens to finders of straying animals and to those who take up animals causing damage, under much the same rules as those of the common law; and the statutes in most cases extend the law to cover the finding of chattels of any kind. If the article is of small value it is sometimes provided that it shall after certain formalities, such as notice and advertisement and the lapse of a certain time, become the property of the finder, if the owner does not appear. If of a value in excess of the stated amount it must be sold at a public sale, and the balance above reimbursement for the expenses of the finder goes to the public funds.

18. **Liens based on mercantile custom.**—The chief thing to remember about this class of liens is that the liens are general and not specific. In other respects, except, of course, as to the source of their origin, they are similar to those given for improvement by skill and labor and those given to persons engaged in public callings.

Factor's liens. A factor is a person employed to sell the goods of another, and for that purpose is

[18] 1 Blackstone, Commentaries, p. 297.
[19] 1 Blackstone, Commentaries, p. 6.

entrusted with their possession. He is paid a commission for so doing and is, in this country, commonly referred to as a commission merchant. The common law accords a factor a general lien.[20]

Wharfinger's and packer's liens. It is well settled in England that a wharfinger like a factor has a general lien based upon mercantile custom.[21] There is also authority according such a lien to a packer. There appear to be no American cases on either wharfingers' or packers' liens. Under statutory and code provisions in many states they are entitled to at least a specific lien.

Banker's liens. Bankers are entitled to general liens on funds or property of depositors in their hands.[22] It should perhaps be pointed out, however, that an ordinary deposit in a bank is not a bailment. The relation of depositor and banker is that of debtor and creditor. In such cases a lien would not have to be invoked in order to allow the banker to use the deposit to pay himself debts due him by the depositor. The banker's lien arises in cases of true bailments.

19. **Liens in legal proceedings.**—*Attorney's retaining lien.* An attorney has a common law lien founded on possession to retain papers or other property, such as money collected, belonging to his client, which he has received in the course of his professional employment, as security for the costs and fees due him for such services from the client. It

[20] Martin v. Pope & Son, 6 Ala. 532, 41 Am. Dec. 66, LEADING ILLUSTRATIVE CASES.

[21] Spears v. Hartly, 3 Esp. 81 (Eng.).

[22] Barnet v. Brandao, 6 M. & G. 630 (Eng.), 134 Reprint 1044.

is a general lien.[23] It seems that this lien originated in the power of courts to regulate the relations between attorneys and clients. Courts have the right to see that attorneys, as officers of the courts, perform their duties to their clients. Likewise they protect the attorneys.[24]

Attorney's charging lien. In addition to the common law lien which is a general one dependent on possession, attorneys have special liens on judgments known as charging liens. In the case of Wright v. Cobleigh,[25] the court, speaking of such a lien, says: "It is properly denominated a lien in the broad sense of the term, but it has few points of resemblance to the ordinary lien upon tangible property. It does not in any way depend upon possession, but rests on the equity of the attorney's claim, to be repaid out of the proceeds of a judgment, for his fees and disbursements which ordinarily constitute a part of the judgment itself. This right is limited to the fees and disbursements of the attorney in that cause, and cannot be extended to 'commissions,' or other charges, however proper in themselves." This right of attorneys is considered in connection with the retaining lien of attorneys for convenience, though it is clearly not one of common law origin, nor is it one similar in character. It is recognized in most of the states. A few do not allow it.

20. **Same subject—Attachments—Judgments.—**

[23] Sanders v. Seelye, 128 Ill. 631, 21 N. E. 601, LEADING ILLUSTRATIVE CASES.

[24] Jones, Liens (2d ed.), § 113.

[25] 21 N. H. 339.

An attachment on mesne process, says Jones, in his work on Liens,[26] does not constitute a lien in any proper legal sense of the term. If upon personal property, the possession is not that of the creditor. The property is in the hands of the law. If on real property, it is a contingent, conditional charge, until the judgment and levy.[27] The same may be said of seizure of property on equitable process. But such possession by officers of the law is commonly spoken of as giving a lien. Why is this? It is because the creditor in whose favor the process is issued is protected in much the same way as he would be by a lien in the strict sense of the word. It is true, his right to satisfy his claim out of the property seized is dependent on the termination of the suit in his favor, but if that contingency happens such creditor has a right upon the property prior to other creditors, whose rights have not attached prior to such seizure.

Executions are sometimes spoken of as giving liens. This is a use of the term similar to its application to attachments. When property is levied on it is, until sold, in the hands of an officer of the law. Even before actual levy, i. e., from the moment of the issue of the process authorizing the levy, it is held, in some states, that the process attaches. That simply means that there is a constructive possession from the time of the issue of the writ of execution. In the absence of a bankruptcy statute, or in case it is not applied, the rule is, "first come first

[26] (2d ed.), § 12.
[27] Ex parte Foster, 2 Story 131, 145-146 (U. S.).

served." In other words, the creditor who first gets his execution or first gets it levied on property has priority, the right to satisfy his claim first out of such property. Such a right protects in a way similar to that of a lien.

Judgments also are not liens in the strict sense. They are charges upon all of the real estate of the debtor, to be enforced upon all or some part of it, and usually take effect from the time they are docketed or recorded. The matter is frequently regulated by statute.[28]

21. **Lien of vendor of personal property.**—When personal property is sold the title passes at once to the buyer, but unless there is a stipulation to the contrary or something inconsistent with such right in the contract, the seller may retain possession until the purchase price is paid. There is a presumption that such was the understanding of the parties. The same is true in the case of contracts to sell. If nothing is said about it, or if there is no term in the contract requiring delivery of the chattel before payment of the price, the presumption is that delivery and payment are to be concurrent acts. This right of the seller to retain is a common law lien, but as it differs from other common law liens in several respects it requires separate treatment. One of the chief differences is in the greater rights the vendor has in the matter of enforcement, a matter which will be taken up later.

If credit is extended it is evidently the under-

[28] The origin of the Judgment Lien, as it is frequently called, may be traced to the Statute, 2 Westminster, 13 Edw. I.

standing of the parties that delivery is not to be withheld. But suppose that subsequently to the agreement, the purchaser becomes insolvent and unable to pay. If the seller still has the chattel should he be allowed to retain it until paid in spite of the stipulation to the contrary? Under such circumstances the law implies a promise on the part of the buyer to keep his credit good and allows the seller to hold the property.[29] Again suppose that at the time of the contract the buyer was insolvent, but the seller did not know of the buyer's inability to pay. Under those circumstances also the seller may retain, on the theory that the seller would not have granted credit if he had known of the insolvency, and the buyer, whether he knew or did not know, has no right to expect the benefits of credit.

22. **Stoppage in transitu.**—An extension of the vendor's lien on personal property is the right to stop it while in transit. Ordinarily when possession is parted with the lien is gone; but when goods are delivered to a carrier, while such carrier may be looked upon as the agent of the vendee or consignee for the purpose of taking title, he yet remains, under certain circumstances at least, the agent of the vendor or consignor for the purpose of retaining possession. If after shipping goods and before their arrival the seller learns that the buyer is insolvent, he has the right to give the carrier notice not to deliver without payment of the price. In that way the vendor may regain possession and its advan-

[29] Crummey v. Raudenbush, 55 Minn. 426, 56 N. W. 1113, LEADING ILLUSTRATIVE CASES.

tages. This right of stoppage in transitu originated in courts of equity, but it has long been recognized by courts of law. Its equitable nature may be seen from the rule that if the bill of lading which represents the goods is transferred while the goods are in transit to a purchaser for value without notice, a good title free from the right to stop is acquired.[30]

23. **Pledges.**—A pledge is a deposit of personal property as security for a debt. The title, unlike the case of a mortgage under the title theory, remains in the pledgor. Only possession or the control of the property passes to the pledgee. A pledge is created by the delivery of the goods. It always arises by express contract while the other retaining liens are usually implied by law. A "pawn" is another name for a pledge. Pawnbrokers are persons who loan money on the security of personal property pledged to them. Another class of transactions which are pledges are known as loans upon collateral security. That name is usually applied to loans by banks secured by the deposit of "paper," such as stock certificates, bonds, and notes. Only personal property can be pledged. Real property may be mortgaged, but not pledged. A pledge may be made of any kind of personal property including securities and choses in action.

Necessity of delivery. Delivery of the goods in every case, either actual or symbolical, is absolutely necessary for a pledge. The very essence of a pledge is a change in possession, in control of the property.

[30] Loeb & Bro. v. Peters & Bro., 63 Ala. 243, 35 Am. Rep. 17, LEADING ILLUSTRATIVE CASES.

The law on this point, when the rights of third parties are concerned, is well settled. But what should be the rule between the parties to a contract to pledge? There is a conflict of authority on this point, but the better view seems to be that even as between the parties themselves, until delivery, the transaction should not be looked upon as a pledge, but merely as a contract to pledge, and the law of contract and not the law of pledge should govern.[31]

24. **Same subject—What constitutes delivery.**—In many cases it is an exceedingly difficult matter to determine whether or not there has been a change of possession. The rule is that the transfer must be accompanied by such change of possession as the nature of the thing will permit. Where the object is small and portable an actual handing over is required. But in the case of heavy objects not easily moved, for example, a pile of bricks,[32] constructive or symbolical delivery is sufficient, something to indicate that there has been a change of control. To pledge choses in action the muniments of title should be given to the pledgee. Property stored in a warehouse may be pledged by transferring the warehouse receipt, and goods in transit by a delivery of the bill of lading.

Property can be pledged only by the owner or by one authorized by him. When the pledge is made by an agent the usual rules as to implied and ostensible authority govern. Generally bailees, having only a special property in the goods in their posses-

[31] Huntington v. Sherman, 60 Conn. 463, LEADING ILLUSTRATIVE CASES.
[32] Macomber v. Parker, 14 Pick. 497 (Mass.).

sion, have no authority to pledge them. But in a number of states, statutes have been passed making valid unauthorized pledges made by factors and other agents who have been entrusted by their principals with the possession of property or of documentary evidence of title to it.

In most respects the rules as to pledges and other liens are similar. Where there are differences they will be pointed out in later chapters dealing with the law applicable subsequent to the time of acquisition. One of these should perhaps be mentioned here, because it is frequently given as the chief distinction between pledges and other common law liens. A pledge carries with it the power of sale if the debt is not paid, while other common law liens do not.

25. **Liens given by persons other than owner.**— The consideration of the question of who may give a lien has been reserved until after innkeepers' liens were taken up, because the exceptions to the obviously general rule concern chiefly innkeepers. The general rule, of course, is that a person other than the owner or one authorized by him cannot give a lien good against the owner.

A lien can be created good against the owner if an agent or person entrusted with the property has the ostensible authority to give the lien. Also actual authority may be implied in fact. A good example of the latter may be found in the case of White v. Smith,[33] cited in another connection. A husband

[33] 15 Vroom 105 (N. J.), 43 Am. Rep. 347, LEADING ILLUSTRATIVE CASES. See § 14.

was put in charge of his wife's wagon to use it in a business which was carried on for the support of the family. It was held that a person who repaired the wagon upon the husband's order had a lien good against the wife.

The question has arisen a number of times whether a mortgagor can give a lien binding on a mortgagee. The general rule is that the mortgagor can bind his own interest only. In the case of Wright v. Sherman,[34] it was held that the lien of a chattel mortgage properly filed is paramount to that of an agistor for subsequently pasturing stock, unless it is shown that the mortgagee consented, either expressly or impliedly, that such stock might be so pastured and subjected to such lien; and that the fact that the mortgagor retains possession of the mortgaged property is not of itself proof of such consent. But in a number of cases it has been found that the mortgagees did expressly or impliedly consent, and of course under such circumstances the mortgagees were bound by the liens.

26. **Same subject—Innkeepers.**—In the leading case of Robinson v. Walter,[35] it was held that an innkeeper has a lien on a horse brought to him by a person not the owner. The reason given was that the innkeeper was bound to receive the horse and hence was entitled to hold him until his keep was paid for. The law in this country is well established to the same effect. An American case so holding, already cited in another connection, is Singer Mfg.

[34] 3 S. D. 290, 17 L. R. A. 792, 52 N. W. 1093.
[35] 3 Bulst. 269 (Eng.), 81 Reprint 227, LEADING ILLUSTRATIVE CASES.

Co. v. Miller.[36] Even stolen property has been held to be subject to the innkeeper's lien.[37] Does it make any difference whether the innkeeper knows that the property brought to the inn belongs to a third person or not? If the goods are of such a nature that the innkeeper is bound to receive them, it should make no difference, and it has been so held.[38] But suppose the article in question is a piano, one which the innkeeper is not bound to receive. If he does so without knowing that it does not belong to his guest he is entitled to a lien. When he does receive such an article his liability for its safe-keeping is as great as for baggage and other things which he is under a legal obligation to receive. On the other hand, if he knows that the piano or any other article in that category is not the property of the guest when he takes it, he is not entitled to hold it for his guest's bill. The leading authorities on this point are discussed in the case of Cook v. Kane.[39] But where the goods are of a class which the innkeeper is ordinarily bound to receive, if they are to his knowledge in the wrongful possession of his guest, he is not entitled to a lien upon them.[40] Under such circumstances he could refuse to receive them.

27. **Same subject—Carriers.**—It is well established that a common carrier has no lien on goods

[36] 52 Minn. 516, 55 N. W. 56, 38 Am. St. Rep. 568, 21 L. R. A. 229, LEADING ILLUSTRATIVE CASES.

[37] Black v. Brennan, 5 Dana 310 (Ky.).

[38] Robins v. Gray, (1895) 2 Q. B. 501 (Eng.).

[39] Cook v. Kane, 13 Oreg. 482, 57 Am. Rep. 28, LEADING ILLUSTRATIVE CASES.

[40] Johnson v. Hill, 3 Stark. 172 (Eng.), 3 Eng. C. L. 641, LEADING ILLUSTRATIVE CASES.

entrusted to him for carriage by a person not the owner or authorized by him. A leading case on the subject which reviews the authorities is Fitch v. Newberry.[41] In that case an old English case, Yorke v. Greenaugh,[42] is referred to. That involved the right of an innkeeper to hold a horse brought to him by a stranger, but in it the Exeter carrier's case is stated, which held that a common carrier has a lien on goods entrusted to him by a wrongdoer. There seems to be little reason why the law should not be the same for carriers as for innkeepers in this matter, as both are obliged to receive goods. But the American cases, at any rate, do not follow the rule in the Exeter carrier's case. Perhaps there is less hardship in denying a lien to the carrier than there would be to the innkeeper. The carrier can refuse to transport the goods unless his charges are paid in advance. It would be very inconvenient and contrary to custom for the innkeeper to do so.

But where goods are placed in the hands of one carrier to be by him transferred to a second, and through the mistake of the first they are shipped contrary to the orders of the consignor, the second carrier, it is generally held, although there is a conflict of authorities on the point, is entitled to hold the goods for his charges. The reason given for a different rule from that applied ordinarily where the shipment is not one authorized by the owner, is that the first carrier is the agent of the shipper. In the case of Briggs v. Boston, etc., R. R. Co.,[43]

[41] 1 Douglass 1 (Mich.), 40 Am. Dec. 33.
[42] 2 Ld. Raym. 866 (Eng.).
[43] 6 Allen 246 (Mass.), 83 Am. Dec. 626.

the principles involved are well discussed, and the case is distinguished from a leading case, Robinson v. Baker,[44] holding that where a carrier gets possession of property from a person not authorized to give it, no lien can be acquired.

[44] 5 Cush. 137 (Mass.), 51 Am. Dec. 54.

CHAPTER III.

LIENS ON PERSONAL PROPERTY NOT BASED ON POSSESSION.

28. **Chief characteristics—Statutory liens.**—In the preceding chapter in connection with common law liens a number of statutory liens have been considered. It has frequently happened that the common law in regard to certain liens has been enacted into the statutes or codes, i. e., the common law has been stated; and also by legislative enactment the provisions of the common law have been extended to cover other similar cases. Such liens are based on possession and are in nearly all respects like common law liens, and they are interpreted by the rules of the common law. But there is a class of liens on personal property which is not based on possession. They derive their force from the statutes creating them. These liens are perfected by notice or by attachment of the property within a certain time. The statutes must be looked to in each case for a determination of the character, extent, and operation of the lien. Courts cannot extend the statutes to cases not specifically covered, and the common law of liens cannot be looked to for interpretation. But such statutes, being remedial, are liberally construed.

It is essential to the acquisition of these liens that all the steps prescribed by the statutes be complied with, in the manner set out.

29. **Same subject—Examples.**—The common law gives the owners of stallions the right to retain possession of the mares served until paid the price of service.[45] The lien is considered as belonging to the skill and improvement class. By statute in many states the owners of stallions and sires, sometimes only where there has been registration and filing of pedigrees, are entitled to a lien on the offspring as well as on the females served upon complying with the terms of the statute. Such statutory liens are acquired by filing and are not lost by giving up possession.

Persons furnishing seed and those threshing grain are frequently given liens on crops by statute; and agricultural laborers are protected in a similar way.

In a number of states statutes give lumbermen liens upon logs cut by them, upon filing their claims.

Landlords, by the common law, have the right to distrain the goods of their tenants to compel the payment of rent. By statute they are, in many states, given liens. These usually apply only to the property belonging to the tenant and not to that of third persons also, as does the right of distress at common law. Bona fide purchasers from the tenant take free from the lien.

Corporations are in some states given liens on the shares of their members for debts due the corporations.

Statutes sometimes provide that taxes shall constitute liens on personal as well as on real property. These are not liens on specific property, but merely

[45] Scarfe v. Morgan, 4 M. & W. 270 (Eng.).

priorities, making property seized for the payment of taxes subject first to such payment. The right is lost if the property is attached or assigned before seizure by the tax collector.[46]

30. **Maritime liens — Distinguished.**— Maritime liens are a special class of liens enforced by courts of admiralty. In this country the federal district courts are constituted courts of admiralty. Unlike common law liens, they are not dependent on possession. It should be noted, however, that there may be common law liens for construction and repairs on ships, and on the cargo in favor of the vessels for freight; and the master has such a lien on the freight earned and may hold the cargo as security. Such liens are dependent on possession. They may be enforced either in courts of common law or of admiralty.

While equitable liens are mere charges enforced by courts of equity, keeping in mind the principle of notice, liens in admiralty are considered rights in the thing itself over which they exist, and they are quite as valid against third parties who do not know of their existence as against those who acquire rights with notice.

Again, maritime liens differ from statutory liens not only as to their origin, but in the method of acquisition. The latter either require possession, or notice, or attachment. Maritime liens arise by their own force to secure certain maritime obligations. They should also be distinguished from statutory liens having reference to shipping, but in respect to

[46] Jones, Liens (2d ed.), § 98.

matters not of a maritime nature. Such rights are enforced in the state courts only.

They differ from all other liens in that they may be enforced by actions in rem, i. e., against the thing itself; and another striking peculiarity of a number of these liens is that later ones may take precedence of earlier; but these are matters which will be more fully considered in later chapters.

31. **Subject matter and obligation.**—Maritime liens can attach only to vessels and their appurtenances, to such movable things as are used in navigation, or upon things which are the subjects of commerce on the high seas or on navigable rivers. The size or nature of the vessel or the means by which it is propelled are immaterial. Over immovable things, such as bridges, docks and wharves, maritime liens cannot be acquired. Such liens arise out of contracts or services rendered of a maritime nature, or out of torts committed to the objects over which the liens may exist.[47]

32. **Liens for supplies and repairs.**—Necessity or apparent necessity is the justification of liens for supplies, repairs, or advances. If the master of a vessel is unable to procure the necessary supplies to continue the voyage, or the repairs on the ship which will make the continuation of the voyage safe, in any other way than on the security of the ship and cargo, he has the authority by law to secure them in that way. If the master has funds of the owner which he ought to apply for such purposes, no necessity exists; and if the person making the repairs or

[47] The Rock Island Bridge, 6 Wall. 213 (U. S.).

furnishing the supplies has knowledge of that fact he is not entitled to a lien. If the vessel is in her home port, supplies and repairs are conclusively presumed to have been obtained on the owner's personal credit, and no liens attach, unless in such cases they are given by the law of the state. Even in a foreign port, if the benefits conferred are upon the order of the owner, no liens are acquired. The general rule is that there can be no maritime lien for repairs or supplies unless furnished in a foreign port, upon the master's order, and on the credit of the ship.[48]

33. **Liens of seamen and master.**—Seamen have liens for their wages on the vessel and also on the freight earned.[49] Who is a seaman is a difficult matter to determine. The services rendered must have reference to the navigation of the vessel. But such protection has never been extended to the master.[50] The master is supposed to trust to the personal credit of the owner. But, as above stated, the master has a possessory lien on the freight earned, and may hold the cargo as security. There is some authority also for a similar lien on the cargo in favor of seamen. Other persons performing maritime services such as stevedores who can perhaps not be classed as seamen have been accorded liens.[51] And where state statutes require the employment of pilots, they are entitled to liens.[52]

34. **Salvage, towage, etc.**—Salvage is in the nature of a reward to persons who save vessels and

[48] Stephenson v. The Francis, 21 Fed. 715.
[49] The Virgin, 8 Pet. 538 (U. S.).
[50] The Steamboat Orleans v. Phoebus, 11 Pet. 175 (U. S.).
[51] The Scotia, 35 Fed. 916.
[52] The Clymene, 12 Fed. 346.

cargo which are exposed to the perils of the sea. The court determines in each case how much or rather what proportion of the value of the property rescued the salvor is entitled to. There is a maritime lien for salvage.[53] There may also be liens for towage, where the service is performed on the credit of the vessel,[54] and for wharfage against a foreign vessel.[55] In the case of other services under contracts liens have been recognized. In contracts of affreightment there is a lien in favor of the cargo against the vessel for safe carriage.[56]

35. **Liens for damages from torts.**—A lien arises against the vessel as security for the payment of the damages arising from all torts committed by the master in the course of his employment, i. e., which have to do with navigation and his duties as master. The usual case is that of collision through negligence. There is a lien in favor of the injured vessel against the one at fault.[57] Unlike the rule at common law barring any recovery in the case of contributory negligence, in admiralty where both ships are at fault the loss is apportioned between them. The lien arises to protect personal injuries as well as those to property.

[53] The M. Vandercook, 24 Fed. 472.
[54] The Erastina, 50 Fed. 126.
[55] Ex Parte Easton, 95 U. S. 68.
[56] Bulkley v. Cotton Co., 24 How. 386 (U. S.).
[57] The John G. Stevens, 170 U. S. 113.

CHAPTER IV.

EQUITABLE LIENS AND STATUTORY LIENS ON LAND.

36. **Equitable liens—General characteristics.**—Equitable liens are charges enforced in courts of equity. They differ from common law liens in that they are not dependent upon possession, and they may encumber real property as well as personal, while common law liens can affect personalty only. They are cut off by transfer to a bona fide purchaser except where he has had actual or constructive notice, such as by recording. They are very numerous. They may arise by express contract, or be imposed by equity to do substantial justice in a great variety of circumstances.

37. **Liens by express contract.**—A charge enforcible as an equitable lien may be created by the express agreement of the owner on either real or personal property. It must appear that the parties intended a charge; and the property must be specific and capable of identification. Such liens may be imposed on shifting stocks of goods and on future property. They are good as between the parties and as to third persons who take with notice, and against volunteers, i. e., such persons as do not give value for the property affected. It is not necessary that the parties use the word lien or charge. An understanding to that effect may be implied from the agreement. Thus a promise in a letter to give a bill

of sale on certain personal property as security for an indorsement was held to give an equitable lien on the property.[58] The same is true of agreements that money advanced to purchase goods shall be secured by them, and of consignments of property by a debtor to his creditor with instructions to apply it in payment.

38. **Liens by assignment.**—An order to pay a debt out of a specific fund belonging to the debtor, or an assignment of a fund or of a part of it, creates an equitable lien on the fund.[59] In a few jurisdictions an assignment of part of a fund gives no lien. A bill of exchange is not an assignment until it has been accepted, and the general rule as to checks is the same. The promise of a debtor to pay out of a specific fund does not constitute an assignment. There must be an appropriation. The assignment is not effectual until the creditor has been notified.

39. **Lien of vendor of real property.**—In England and in about half of our states an unpaid seller of real estate is in equity accorded a lien on the property sold as security for the payment of the purchase price. In the other states the lien is not recognized.[60] It is presumed to arise from the intention of the parties, and consequently where a contrary intention is shown there is no lien. Those states which favor it say that there is a natural equity that the land shall stand charged with so much of the purchase money as is not paid at the time of the con-

[58] Read v. Gaillard, 2 Desaus. 552 (S. C.), 2 Am. Dec. 696.

[59] Phillips v. Edsall, 127 Ill. 535.

[60] Kauffelt v. Bower, 7 Serg. & Raw. 64 (Pa.), 10 Am. Dec. 428, is a case in point.

veyance. The other states say such a lien is inconsistent with the general policy in this country of making all matters of title dependent on record evidence. However, the doctrine that a bona fide purchaser takes free from the lien where he has neither actual nor constructive notice, of course, prevails. This lien, even where recognized, is generally held to be not assignable, and where not assignable there can be no subrogation to it.

40. **Vendee's lien on land.**—A purchaser of real property who pays part or all of the purchase price without getting title is accorded in equity a lien upon the land as security for the money paid.[61] Where a person buys land from a trustee who has no right to sell it to him, and pays part or all of the purchase price and gets the title before notice of the trust, the beneficiary has the option of demanding a reconveyance, or of affirming and taking the unpaid balance, if any. In case the beneficiary demands a reconveyance the vendee has a lien on the land for the amount paid to the trustee in good faith.

41. **Cestui's lien and trustee's lien.**—Where a trustee has parted with the legal title of trust property to a purchaser for value without notice, and has purchased other property with the price, the cestui, that is, the beneficiary, has the option of accepting the property, or of holding the trustee liable for the misapplication of trust funds. If he chooses the latter alternative he has a lien on the property purchased. The trustee, on the other hand, is entitled to payment out of the trust property of

[61] Wickman v. Robinson, 14 Wis. 493, 80 Am. Dec. 789.

all expenses properly incurred by him in the performance of his duties as trustee and has a lien on the trust property for such expenses.

42. **Improvement liens of occupants.**—At common law when a person made improvements on land, even in good faith, thinking himself to be the owner, and it subsequently turned out that he was not the owner, he could recover nothing for such improvements. He is considered a wrongdoer. The true owner recovers his property with all the buildings and improvements upon it. He is under no obligation to pay for what he did not consent to and perhaps does not wish. But where, in addition to ejecting the party who has been holding bona fide, the owner brings an action of trespass for mesne profits, the value of improvements may be set off against the use of the land. This right was first accorded in courts of equity when a bill for an accounting of rents and profits was brought, but afterwards the same rule was adopted by courts of common law.[62] The right of the innocent occupant in such cases is an equitable lien. Therefore if the true owner stands by and sees the occupant make the improvement without giving notice of his title, a lien will rise in favor of the occupant. In a number of states statutes have been passed regulating the matter. Some merely state the law as developed and limit the amount of the lien to the liability of the occupant for use and occupation. Others provide that the occupant in good faith shall have a lien for the full value of the improvements. In some cases the liens

[62] Green v. Biddle, 8 Wheat. 1 (U. S.).

are enforcible in a manner provided by the statutes and in others the owner is given the option of paying the occupant for the value of the improvements or of surrendering the land to the occupant upon payment of the value in its improved state.[63]

43. **Other implied equitable liens.**—There are many other liens implied in equity in the absence of express contract obligations. Among them are equitable charges by will. The devisee or legatee is not under a contract obligation to the beneficiary, so at common law there is no remedy. Another such lien is that of creditors of a corporation upon its capital stock. By that is meant that a corporation cannot injuriously affect the rights of creditors by purchasing and retiring its own stock, or by paying out dividends to its shareholders where such payment impairs the capital of the corporation. If it does so, liens arise in favor of the creditors on the funds thus diverted.[64]

44. **Statutory liens on land—Mechanic's liens.**—It is provided in many states that persons who perform labor or furnish materials for the construction or repair of buildings shall be entitled to liens on such buildings and on the land on which they are situated upon complying with the provisions of the statutes. The right to acquire such liens arises when the labor or materials have been furnished under a contract with the owner of the land or his agents or with the owner's consent. The orders are frequently given by contractors or subcontractors. In order to

[63] Jones, Liens (2d ed.), § 1140.
[64] Jones, Liens (2d ed.), § 84.

complete the lien, at least so far as incumbrances and the rights of subsequent purchasers are concerned, there must be a filing within a certain stated time, perhaps 90 days from the time of the completion of the work. Many of the statutes have elaborate provisions safeguarding the rights of the several parties, such as that an itemized account must be kept separate from other accounts against the owner, and the like. The statute in each case must be carefully looked into.

45. **Miner's liens.**—Miners are protected by statutes conferring upon them liens on the mines and their appurtenances for furnishing labor and materials, upon compliance with the provisions of the statutes. They are similar in many respects to mechanic's liens, but in detail often differ, sometimes in important respects. For instance, mechanic's liens are usually good until they lapse by a failure to refile, while miner's liens are frequently good for a shorter time only, perhaps a year. The statute in each state must be studied for its provisions.

46. **Liens for taxes, costs and fines.**—The nature of tax liens on personal property has already been considered. Statutes commonly provide that taxes shall constitute perpetual and paramount liens on the real property on which they are levied. Unlike liens on personal property, tax liens on land adhere to the land and follow it into the hands of purchasers. There is authority[65] to the effect that taxes on land are not personal obligations, but mere charges on the land. Some statutes provide that personal prop-

[65] Hertzler v. Cass Co., 12 N. D. 187, 96 N. W. 294.

erty taxes shall create liens on all the real and personal property owned by the delinquent tax payer at the time the tax falls due, or which may subsequently be acquired by him; but in the case of personal property only such of it can be affected as remains in the ownership of the delinquent at the time of the distraint. Such a tax lien on real property is obviously of a different nature from that which arises out of non-payment of the taxes on a specific piece of land. The former is a floating right in the nature of a priority, while the latter is a specific lien on the land concerned. Fines for violation of criminal statutes, such as using premises for the sale of liquor contrary to law, and the costs of the prosecution, are sometimes made liens on the land so used.

CHAPTER V.

LIENS AND PLEDGES AS BAILMENTS AND THEIR ASSIGNMENT.

47. **Possessory liens and pledges as bailments.**—Hammond in his Synopsis of Bailments[66] says: "A bailment may be said to exist whenever the possession of a chattel is lawfully severed from its ownership, or from any right derived from and representing ownership." During the continuance of all liens dependent on possession, the relationship of the parties is that of bailor and bailee. Pledges also constitute an important class of bailments. In this article this aspect of liens and pledges is to be treated only in the briefest way. For further information on the law of bailments, see the article on Personal Property and Bailments.

48. **Right to retain and its protection.**—A possessory lien is by its very definition a right to retain. A person who holds a chattel by virtue of a lien has a special property in it which entitles him to the use of all the forms of action which protect possession. Pledgees also have the right to retain until the debt for which the pledge is made is discharged, and can protect such right by all appropriate remedies such as replevin, trespass or trover. If trespass or trover is brought full damages may be recovered by the lien

[66] Cited in Hale, Bailments, p. 5, note.

holder. The excess above his own interest is held in trust for the owner. In the case of U. S. Express Co. v. Meints,[67] the property was stolen from the pledgee and delivered to the express company to be shipped. The pledgee brought an action of trover and it was held that he could recover the value of the property. The right to retain possession is enforcible against the owner as well as against third persons. A finder of a chattel has a right to it superior to that of any one except the owner and may protect such right by action.

49. **Right to use and profits.**—A lien-holder has no right to use the chattel in his possession, and neither has a pledgee.[68] If it yields any profits they must be applied towards the payment of the debt, and a surplus, if any, is held in trust for the owner.[69]

50. **Expenses of keeping.**—A pledgee is entitled to the necessary expenses incurred in keeping and caring for the property pledged.[70] There is an implied term in the contract to that effect. We have seen also that there is some authority holding that a finder has a right to be compensated for the care and expense to which he has been put.[71] But what little authority there is on the subject as to the rights of lien-holders in general is that they are not so entitled.[72] The reason given for the rule is that a person is not entitled to charge for services for his own

[67] 72 Ill. 293.
[68] McArthur v. Howett, 72 Ill. 358.
[69] Felton v. Brooks, 4 Cush. 203 (Mass.).
[70] Hills v. Smith, 28 N. H. 369.
[71] Chase v. Corcoran, 106 Mass. 286.
[72] British Empire Shipping Co. v. Somes, E. B. & E. 353 (Eng.).

benefit. The chattel is held against the will of the owner and therefore he cannot be said to impliedly consent to pay for the expenses of keeping. It might be said in reply, however, that an owner might be benefited quite as much by care bestowed by a lien-holder as by that of a pledgee or finder and the law might as reasonably imply a right to compensation in one case as in the other. We have here another instance of the reluctance of the common law to impose obligations without consent, even where a benefit has been conferred.

51. **Duty of care for chattel.**—A pledgee is bound to exercise ordinary care for the pledged property.[73] Such care is that exercised by the ordinary man in the management of his own affairs. It varies with the nature and value of the property. The retention of the pledge is not for the sole benefit of the pledgee. The whole transaction is looked at and the bailment considered as one for the mutual benefit of the parties. Lien-holders in general are under similar obligations to exercise diligence. Innkeepers, as long as the relationship of innkeeper and guest continues, are under exceptional liability, making them almost insurers of the guest's property brought to their hotels. But when the relationship has been terminated, and they then continue to hold baggage by virtue of their lien, they cease to be under extraordinary liability and are responsible only for want of ordinary care.[74] Likewise a common carrier's exceptional liability ceases after the transit is

[73] Cooper v. Simpson, 41 Minn. 46.
[74] Murray v. Marshall, 9 Colo. 482, 13 Pac. 589.

ended and delivery is completed or waived by the owner. If goods are still held under the carrier's lien, there is a duty to exercise ordinary care.

52. **Duty to return to owner.**—When a lien has come to an end in any way, there is no longer a right to hold the property and a refusal to allow the owner to take it makes the former lien-holder liable for conversion. And where a pledge is redeemed, it is the duty of the pledgor to redeliver the chattel pledged in the condition in which it was at the time he received it, together with the income or profits derived from it, if any.[75] If a pledgee sells before the time for payment he has put it out of his power to return upon redemption, and is guilty of a conversion.

53. **Assignment of liens.**—Common law liens are not assignable.[76] In the case of Glascock v. Lemp[77] a livery stable keeper made a written assignment of his claim for which he was entitled to a lien under the statute. The assignee took possession of the horse and in action brought against him by the owner it was held the lien could not be set up as a defense. The lien is said to be a personal privilege and not assignable. The interest of a common law lien-holder is not subject to attachment;[78] nor can it be taken on execution. It is no more capable of involuntary assignment than of voluntary. But statutory liens which are not dependent on possession are generally

[75] Hunsaker v. Sturgis, 29 Ga. 142.

[76] Mathias v. Sellers, 86 Penn. St. 486, 27 Am. Rep. 723, LEADING ILLUSTRATIVE CASES.

[77] 26 Ind. App. 175, 59 N. E. 342.

[78] Holly v. Huggeford, 8 Pick. 73 (Mass.), 19 Am. Dec. 303.

assignable and the transfer of the claim usually carries with it the right to the lien. Equitable liens reserved by express agreement are assignable and pass by a transfer of the debt secured. In Murray v. Able[79] a transferee of a note given for the purchase price of land where the lien was reserved in the note was allowed to enforce the vendor's lien. But where the lien is not reserved by contract it is generally held that it does not pass by an assignment of the debt. Maritime liens and the claims they secure are freely assignable.[80] Where a person is compelled to pay the debt of another secured by a lien he is subrogated to the rights of the lien-holder.[81]

54. **Assignment of pledges.**—In the matter of assignability the interest of a pledgee differs from that of other common law lien-holders. A pledgee has a transferable interest.[82] He may assign all of his rights, or he may repledge the goods as security for his own debt. The pledgee's interest is subject to attachment and execution.

[79] 19 Texas 213, 70 Am. Dec. 330.
[80] Park v. The Hull of the Edgar Baxter, 37 Fed. 219.
[81] Crawford v. Richeson, 101 Ill. 351.
[82] Belden v. Perkins, 78 Ill. 449.

CHAPTER VI.

DISCHARGE AND ENFORCEMENT.

55. **Discharge by waiver.**—*Surrender.* Possessory liens and pledge liens are lost by a voluntary surrender of the property to the owner, but if the giving up is involuntary or the result of fraud the lien is not discharged.[83] If a lien is released through fraud or mistake or if for some other reason it is necessary to do justice, equity will restore the lien. But if a lien is voluntarily given up it cannot be again acquired by regaining possession. Surrender of part of the property over which the lien exists does not prevent the remainder from being held subject to the lien.

Attachment or execution. If the lien-holder attaches the goods on which he has a lien he is deemed to have waived his lien, unless he has other demands not secured by the lien and gives notice to the officer that he does not waive the lien.[84] An execution levied on the property by the holder of the lien has a similar effect.

Taking other security. The general rule is that the mere fact of taking other security for a debt does not constitute a waiver. There must be something inconsistent with the lien in the new security. But some statutory provisions make the taking of se-

[83] Wallace v. Woodgate, 1 C. & P. 575 (Eng.), 12 Eng. C. L. 328.
[84] Townsend v. Newell, 14 Pick. 332 (Mass.).

curity in connection with particular liens such as mechanic's liens and the liens of vendors of land constitute a waiver of the liens.

Agreement and lapse of time. It goes almost without saying that a lien may be discharged by express agreement, and an understanding to the same effect may be implied from an agreement inconsistent with the lien. Statutes not infrequently provide, particularly in connection with liens created by statute, that they shall lapse after a certain time has passed. Sometimes to keep a lien alive it is necessary to file it from time to time. Failure to sue to enforce a lien, such as a mechanic's lien, may constitute a waiver. Equitable and maritime liens may be lost by laches or by staleness, that is, by undue delay in enforcing. Possessory liens keep alive as long as the possession continues, and they are not lost on account of the barring by the statutes of limitations of the claims which they secure.

56. **Discharge by forfeiture.**—*Refusal to deliver upon grounds other than the lien.* If a person who has a lien on property refuses to give it up to the owner on some other ground than the lien, such as asserting title in himself, he forfeits his lien. But an unqualified refusal to deliver is not a claim inconsistent with the right to hold by virtue of the lien. In the case of White v. Gainer,[85] the defendant had a lien on some cloth. He then purchased it of the bailor after the latter had become bankrupt. The assignee in bankruptcy demanded the cloth. Defendant refused to give it up, saying, "I may as well

[85] 2 Bing. 23 (Eng.).

give up every transaction of my life." It was held that the lien was not lost.

Conversion by lien-holder. Any wrongful dealing with the property held by a lien will forfeit the lien. An unauthorized use of the property, a sale not allowed by law, and the like, destroys the lien. In addition, in such cases, as well as in the one above mentioned, of a refusal to give up the property on grounds other than the lien, the party so acting becomes liable for conversion.

Conversion by pledgee. The rule is otherwise in the case of a pledge. The pledge-holder who deals wrongfully with the pledged property lays himself open to an action of conversion, but the pledge lien is not forfeited thereby.[86] It seems the pledgee's right is looked upon as more in the nature of a property right than is that of the common law lien-holder. The latter is said to have merely the right to retain.

57. **Payment—Destruction of property—Merger—Bankruptcy.**—Payment of the debt secured or satisfaction in any way destroys the lien or the right to retain a pledge. A release or receipt in full has the same effect; and likewise a proper tender puts an end to the lien. It need hardly be mentioned that by the destruction of the property subject to the lien the lien disappears. Merger by a joining of the general ownership with the lien destroys the lien; but if it is necessary to do justice the lien will be considered as kept alive by courts of equity. The bankruptcy of the owner does not destroy liens on the property, but liens acquired within a specified

[86] Williams v. Ashe, 111 Cal. 180.

time before bankruptcy to secure past debts are discharged by the subsequent bankruptcy.

58. **Enforcement of common law liens.**—Common law liens are merely rights of retention. In the absence of statutory provision there is no means of foreclosure or enforcement.[87] Courts of equity will not enforce such liens unless matters of account are involved. But now in many states remedies have been provided for. Sales are authorized to be made in the manner prescribed.

59. **Enforcement of pledges and of vendor's liens.**—One of the chief differences between pledges and other common law liens is that the former carry with them the power of sale, while the latter do not. If the sale is at common law, that is, if it is implied by law from the nature of the transaction, notice must be given to the pledgor and the sale must be a public one.[88] It may, however, be a part of the contract that the pledgee shall have the right to sell. In such a case the sale may be in any manner that the parties see fit to agree upon. An unpaid seller of personal property who retains possession as security has the option of doing one of two things. He can either sell the goods and sue the buyer for the balance of the purchase price, if any, or he can revest title to the goods in himself, i. e., he is entitled to rescind the sale and he may sue for a balance above the market price.[89] If he sells the property, it is not necessary that he do so by public sale. He can

[87] Briggs v. Boston, etc., R. R. Co., 6 Allen 246 (Mass.), 83 Am. Dec. 626.
[88] Union Trust Co. v. Rigdon, 93 Ill. 458.
[89] Bagley v. Findlay, 82 Ill. 524.

make a private sale and it is sufficient for him to show that the price he received was a fair one. It is not essential for him even to notify the purchaser. In both of these matters the vendor's rights are different from those of the pledgee. If the seller elects to revest the property in himself and subsequently sells it for a price greater than that of his former contract, he has the right to retain the full amount and need not turn over the surplus to the purchaser who failed to pay him for the property.

60. **Enforcement of statutory liens—Priority.**—Statutory liens based on possession, as they usually merely extend common law liens, are in general governed by the same principles and, unless there are special provisions as to their enforcement or general provisions as to all liens, are not susceptible of foreclosure. Courts of equity will not foreclose such liens. But as to those liens created by statute which are not dependent on possession, the statutes themselves provide the method of enforcement. The statutes must in each case be inspected. The statutes also are full of provisions as to the matter of priority. Certain liens are favored, such as those to farm laborers, and take precedence over liens and other incumbrances put upon the property at prior times, and which, therefore, according to general principles, should be paid first.

61. **Enforcement of equitable liens—Priority.**—Equitable liens are enforcible in courts of equity only. The usual method is by an order of sale of the property.[90] It has already been pointed out that the

[90] Perry v. Board of Missions, 102 N. Y. 99.

priority of equitable liens as to the rights of third parties is dependent upon the principle of notice. Subsequent purchasers and attaching creditors are bound by equitable liens if their rights are acquired with either actual or constructive notice of them. The general principle applicable to all liens and incumbrances, that the one prior in time prevails, is of course the rule here also. The difference is that even if an equitable lien is earlier it may be postponed to a later legal right if the holder of such right had no notice of the prior equitable right when his own was acquired.

62. **Enforcement of maritime liens—Priority.**—Maritime liens are enforced in courts of admiralty. Proceedings in rem, known as libels, may be brought to enforce them. An action in rem is one against a thing. The ship or other maritime property on which the lien exists is made the defendant in the action. Actions in courts of common law and in courts of equity are in personam, i. e., they are brought against persons. The property libeled may be sold to satisfy the liens. A principle peculiar to admiralty in many cases gives priority to later liens and incumbrances. Thus liens arising from the preservation of vessels are paid in the inverse order of their dates. This is true of salvage services and of liens for repairs.[91] Liens not for improvement or preservation are paid in the order in which they accrue. The reason given for preferring later claims is that the property subject to the earlier liens has been preserved by the later services. If, for instance, salvage services had

[91] The J. W. Tucker, 20 Fed. 129.

not been performed the ship would have been lost and the prior lien-holders would have lost their security. Liens for seamen's wages take precedence over nearly all others. Their services go to preserve the ship, and in addition they are looked upon as wards of the court. But a lien for damages for collision overrides even the liens for seamen's wages, as it is said the seamen share in the fault of negligent navigation and it would be bad policy to allow them priority in such cases.[92] For other questions of priority in the matter of maritime liens, works on admiralty should be consulted.

BIBLIOGRAPHY.

Jones on Liens (2d ed.), 1894; *Jones* on Pledges and Collateral Securities (3d ed.), 1912; and the articles on liens and pledges and the cross references to the articles on particular liens in Cyclopedia of Law and Procedure and in American and English Encyclopædia of Law.

[92] The F. H. Stanwood, 49 Fed. 577.

LAW OF AGENCY

BY

WILLIAM A. FERGUSON, A.M., LL.B.*

CHAPTER I.

INTRODUCTION.

1. **Agency as a separate branch of the law.**—The law of agency is, strictly speaking, a part of the law of contracts. It is, however, treated as a separate topic in the development of substantive law and there are many textbooks on the subject, as well as many collections of cases. It is often treated under the title "Principal and Agent," and under that head it may be looked for especially in digests, encyclopedias, and other legal reference books.

Agency as a distinct subject was hardly known to the common law. Some of the rules applicable to the rights, duties, and liabilities of the servant as they were formulated under the subject of "Master and Servant" were applied to the agent. It is not denied that an agent is an employee, but he is an employee of a peculiar character and bears a closer personal relationship to his employer than the ordinary servant, and it has therefore come to pass that

* Lecturer on "Agency" and "Partnership," Fordham University School of Law, New York City.

instead of treating the subject of agency under the head of "Employer and Employee," or under the head of "Master and Servant," it has been found necessary, by reason of the distinct rules applying to agency, to treat it under its own title. In the complex business arrangements of modern times a principal may need many representatives to act on his behalf in matters involving skill, judgment, and discretion, and it is with regard to the relationships arising out of this representation, as between the principal and the agent, between the principal and the third party with whom the agent deals, between the agent himself and the third party, that we have to treat in the discussion of this subject.

2. **Agent defined.**—An agent is one who acts for and on behalf of another person called the principal, in the same manner as the principal might himself act in the particular matter in which the authority is conferred. It is therefore a relationship founded upon contract; that is to say, the principal agrees to confer the authority upon the agent, and the agent agrees to carry out the authority so conferred. It will be shown later that this authority may be express or implied. It may be an authority conferred by written power of attorney or it may be an authority conferred orally. To establish the relationship a writing is not necessary except in the particular case wherein an agent is required to do or perform an act under seal, in which event the authority given to him must be under seal, because of the doctrine that authority to execute an instrument under seal must be evidenced by an instrument

of equal solemnity. An agent is sometimes called an attorney-in-fact.

3. **Principal defined.**—The principal is the person for, and on behalf of whom, the agent acts; the person who confers the authority on the agent. The principal is the constituent; the agent is the representative. When therefore one person duly authorizes another person to act on his behalf, an agency is created within the terms of the authority conferred, and the act done by the agent within that authority has the same binding effect upon the principal as if the act were done by himself. *"Qui facit per alium facit per se"* is a Latin maxim fundamental in the law of agency and means: "He who acts through another acts for himself." The principal, acting through the medium of the agent, is brought into contractual relations with other persons, with the same effect as if he made the contract directly. He acquires the same rights and is subject to the same responsibilities through the act of the agent as if he acted on his own behalf.

4. **Servant and agent distinguished.**—It is often said that every agent is a servant, but that every servant is not an agent. Agency is looked upon as a higher form of employment than service. A servant is usually not vested with authority to bring third parties into contractual relationship with the master and usually is not a factor causing a change of legal relationship between the master and third persons. It is only where the servant commits a breach of his obligations or injures some person in the performance of his master's instructions that the

master is put under obligations to other parties through the servant's acts. The servant, therefore, is one who is usually employed by the master to perform mechanical and fixed duties and is usually not vested with authority to perform, on behalf of his master, acts calling for the exercise of skill, judgment, or discretion, and, generally speaking, is an employee of more restricted authority than the agent.[1]

5. **Classes of agents.**—Among the more common classes under which agents are grouped are those resting upon the extent of the authority conferred, namely: general agents and special agents. A general agent is one who is empowered to transact all of the business of his principal of a particular kind, or one who is empowered to transact all of his principal's business in a particular place. A principal may have more than one general agent. He may have a general agent in Baltimore and one in New York, and in each place the agent represents the principal in the particular line of business delegated to him; or the principal may have a general agent to manage his real estate, and one to manage his manufacturing business.

A special agent is one who is authorized to act in a particular transaction. He cannot bind his principal in any other transaction than that in which he is given authority. It is to be borne in mind that a special agent is just as much an agent as a general agent in the particular matter in which he is author-

[1] Wakefield v. Fargo, 90 N. Y. 213, LEADING ILLUSTRATIVE CASES; Singer Manufacturing Co. v. Rahn, 132 U. S. 518.

ized to act. It will therefore be seen that it is the extent of the authority conferred which makes the agent either general or special.

Another classification of agents includes those called universal agents. Universal agency is not of common occurrence and, generally speaking, where the term is used, it refers to an agency wherein a person is authorized to transact all of the business of a principal of every kind and nature.

6. **Special forms of agency.**—There are certain forms of agency which have rules somewhat peculiar to themselves and make up a special body of the law on this subject that requires special consideration. These forms of agency will be more fully treated in the last chapter of this article. The most common of the special forms of agency are Attorneys-at-Law or Attorneys and Counsellors-at-Law, Auctioneers, Brokers, and Factors or Commission Merchants.

Partners are sometimes placed in this group, but the rights, duties and liabilities of partners, as between themselves and as to third persons, form a special branch of the law and are treated under the topic "Partnership." It is true that in every partnership there is an agency, that is to say, each partner within the scope of the partnership business is an agent for the firm. To put it differently, each partner may bind the co-partnership by any legitimate act performed within the proper limitations of the partnership business.

CHAPTER II.

FORMATION OF THE RELATION OF PRINCIPAL AND AGENT.

7. **Purposes for which an agency may be created.**—As a general rule any act which may lawfully be done by a principal may be done by him through an agent. If a principal is capable of making any other contract he may make the contract of agency and in the contract he may authorize his agent to do any act which he might himself lawfully do. The principal being prohibited by law from performing an illegal or immoral act, or one opposed to public policy, he cannot do or perform such act through an agent. If this be attempted the agency will have no binding force. The law will not aid in the performance of a contract made through an agent if the object to be attained be illegal or immoral or against public policy. Sometimes a contract or a statute requires an act to be performed by a person in his individual capacity; such acts are in the nature of trusts and could hardly be considered in a discussion of the law of agency.

8. **Illegality of object.**—As to the illegality of the object of an agency the illustration is frequently cited which refers to the authority given to one to use his influence with the government to procure the enactment of certain laws or public acts. An agent who is employed to procure or defeat legislation by

use of personal solicitation or influence with legislators cannot compel payment for his services. Such a contract of agency is void as being contrary to public policy. The gist of the decisions in this connection is that such an arrangement has a tendency toward corruption of public officials. Even where no corrupt act is specifically pointed out and no illegal or undue personal influence is shown, yet the courts condemn such contracts of agency on the particular ground that they are contrary to public policy and tend toward a wrongful influence over governmental action. Law makers and officials having to do with public affairs must be free and deliberate in the performance of their obligations. It is not the actual use of corrupt methods by the agent but the necessarily injurious tendency to use corrupt methods which condemns such contracts as illegal and contrary to public policy. As was said in one case:

"It is not necessary to adjudge that the parties stipulated for corrupt action or that they intended that secret and improper resorts should be had. It is enough that the contract tends directly to these results. It furnishes a temptation to the plaintiff (agent) to resort to corrupt means or improper devices to influence legislative action."[2]

So in like manner one employed to render services to prevent prosecutions for crime and to use his influence with public prosecutors cannot enforce payment for his services. Gambling contracts, being

[2] Mills v. Mills, 40 N. Y. 543, 100 Am. Dec. 535, LEADING ILLUSTRATIVE CASES.

void when made by the principal, are void when made through an agent.

On the other hand, however, an agent may be employed in connection with matters affecting the public weal when the nature of the employment is to seek a proper and legitimate object. An agent may be authorized to make arguments before a legislative committee or before the head of a department of government, or to prosecute a claim against the government or a public official, or to procure and submit petitions to a legislative or investigating body. These, because the objects are legal ones, namely: openly to present reasons for or against a contemplated public act, or to recover, through the medium of the courts, a disputed claim.

To sum the matter up, then, it may be stated generally that an agent may be employed to do or perform any act or thing which the principal himself is capable of lawfully doing or performing.

9. **The contract of agency.**—The relation of principal and agent is formed by a contract between the principal and the agent, whereby the principal authorizes the agent to perform a certain act and the agent agrees to perform such act. It is a meeting of the minds of both parties on the subject matter in question. It is a mutual consent to the formation of the relation. Once the contract is formed it is binding upon both parties and when the agent acts under the contract and within the scope of the authority conferred he brings the principal into contractual relationship with the third persons with whom he deals. It is only when the agent oversteps

the contract or performs some unauthorized act that the principal is relieved of responsibility. In such case the agent is not acting under his contract with the principal and so cannot bind the principal.

"It is axiomatic in the law of agency that no one can become the agent of another except by the will of the principal, either expressed or implied from particular circumstances; that an agent cannot create in himself an authority to do a particular act by its performance, and that the authority of an agent cannot be proved by his own statement that he is such."[3]

The contract of agency need not be in writing, unless it be one of the particular cases where the agent is required to perform an act under seal; or unless a writing is made obligatory by statute. The contract may be express or implied. It is express when it is made by the voluntary and express act of the parties, as by word of mouth or by a written instrument, which may be under seal or without seal, in the form of a letter or memorandum, or some less formal document. It is implied when it is inferred from the circumstances of a particular case, or from the acts, words, or conduct of the parties, or springs from the operation of some rule of law. An implied agency often arises from estoppel, that is to say, the principal will be estopped to deny the agency when his acts and conduct have led others to believe, on reasonable grounds, that the agency has in fact been created.[4]

[3] Graves v. Horton, 38 Minn. 66.

[4] Pole v. Leask, 33 L. J. Rep., Eq. 155 (Eng.), LEADING ILLUSTRATIVE CASES.

Appointment of agent to execute instrument under seal. Authority to execute an instrument under seal must be evidenced by an instrument under seal. Authority to execute a deed must therefore be conferred by power under seal. A sealed instrument, signed by an agent under parol authority, may, under certain circumstances, have effect. If the contract made by the agent be valid without a seal, it may be considered valid as a simple contract, although a seal was affixed. A conveyance executed by an agent who had parol authority may be given effect as a contract to convey, and a suit for specific performance may be based upon the paper actually executed. It may be stated, however, as the general rule, that when an agent is authorized to execute a contract under seal his appointment must be evidenced by an instrument of equal solemnity.

Appointment of agent to execute writings not under seal—Statute of Frauds. Statutes often require particular contracts to be reduced to writing; but it does not necessarily follow, unless the statute so states, that authority to execute such contracts must be in writing. By the provisions of the Statute of Frauds in the United States, as well as in England, the creation, assignment, and surrender of estates, with the exception of leases for a period not exceeding one year, are required to be by deed, and here the authority of the agent should be under seal. According to the provisions of the Statute of Frauds which relate to special promises of executors and administrators to answer out of their

own estate; to special promises to answer for the debt, default or miscarriage of another; to agreements made upon consideration of marriage; to contracts for sales of land and interests in lands; and to agreements not to be performed within one year, all of which require the agreement, or some note or memorandum thereof, to be in writing, the writing may be signed by the party to be charged or by some person thereunto lawfully authorized. The manner in which the agent is to be lawfully authorized is left to the rules of the common law; hence the agent need not be authorized by writing, and any form of ratification is sufficient.[5] In some states, however, it is required that the authority must be in writing.[6]

The same rules apply to the provisions of the Statute of Frauds with regard to contracts for the sale of goods, wares and merchandise for the price of $50 or over.

Contracts for the employment of agents wherein the agency is to continue for more than one year are governed by the Statute of Frauds and the agreement, or some note or memorandum thereof, must be in writing.[7]

10. **Elements of contract.**—All the elements necessary to any other enforcible contract must be present in the contract of agency, that is, the contract must be binding upon the principal as well as

[5] McLean v. Dunn, 4 Bing. 722 (Eng.); Hawkins v. Chace, 19 Pick. 502 (Mass.); Wiener v. Whipple, 53 Wis. 298.

[6] Chappell v. McKnight, 108 Ill. 570; Hall v. Wallace, 88 Cal. 434; Castner v. Richardson, 18 Colo. 496.

[7] Williams v. Bemis, 108 Mass. 91.

upon the agent; the parties must be competent to act; there must be a consideration, and the object to be attained must be legal. As to the form of the agreement, generally, there is no particular form required. I may say to a person, "I authorize you to sell my automobile for a sum not less than $2,000, and in the event of your selling the machine I will pay you 10 per cent of the price." This contract is as binding upon me as if I put it in the most formal writing. It is binding on the agent when he accepts the appointment. It is true the agency may be revoked, but that subject will be considered in another place; while the appointment remains in force it forms the basis of an enforcible contract.

Relationship between the parties, such as husband and wife, or parent and child, does not in itself indicate that one may act for the other as an agent. There must be a contract between these parties as between others, and the authority to act for the other must be shown to have been properly conferred.[8]

11. **Consideration.**—There must be a consideration in agency, as in all other contracts. It has been tersely put that consideration consists in benefit to the promisor, or in harm, detriment, or inconvenience to the promisee. It may be mentioned, however, that as to third persons the absence of a consideration between the principal and the agent is immaterial. The third person is not always put upon inquiring as to the existence or non-existence of a consideration, especially not in cases where the

[8] McLaren v. Hall, 26 Iowa 297; Johnson v. Stone, 40 N. H. 197.

principal, by his acts and conduct, estops himself from denying the agency.

12. **Who may be principal.**—Parties competent to make any other contract may make a contract of agency. A principal who is capable of making any other contract may employ an agent. If he is competent to act for himself, he may act through an agent in respect to the same thing. Sometimes, however, the question arises, "Can an incompetent principal act through a competent agent?" and on the other hand, "Can a competent principal act through an incompetent agent?" It is to be borne in mind that the principal is the real party in interest. He is the one who may enforce or be bound by the acts of the agent, and the contract made through the agent is really his. It is proper to say therefore that any person who is competent to make a contract may be a principal; that is, he may employ an agent and invest him with authority to act on his behalf in any legitimate transaction. One therefore who, owing to disability of any kind, is incompetent to contract in his own behalf may not act through an agent.

13. **Same subject—Infant principals.**—It has been said that "the only act an infant is incapable of performing as to contracts is the appointment of an agent or attorney."[9] If this proposition were true in all jurisdictions an infant could not be a principal and the act of any agent appointed by him would be void. Infants' contracts, however, are not

[9] Trueblood v. Trueblood, 8 Ind. 195. See also Armitage v. Widoe, 36 Mich. 124.

void, but voidable; that is to say, contracts of an infant may be avoided by him upon the plea of infancy, which is personal to the infant. The general rule on the subject would seem to be that the contract of an infant appointing an agent is to be considered in the same light as all his other contracts, namely: that they are voidable and not void; and that until the infant asserts the defense of infancy the acts performed by the agent on his behalf will be sustained.[10]

14. **Same subject—Insane persons.**—Like the contracts of an infant those of an insane person are, generally speaking, not void, but voidable at his option. The lunatic, however, cannot avoid his contract if the other party did not know of his infirmity and had no reason to suspect the lunatic's condition of mind, and acted in good faith, and if the contract has been so far executed that the parties cannot be restored to their original position.[11] As between the principal and agent, if the agent at the time of the appointment knows that his principal is an idiot, lunatic, or insane person, there is of course no contract of agency and the agent cannot therefore deal with the property or jeopardize the rights of the lunatic. In considering this question with regard to the rights and liabilities of third persons the courts will invariably inquire whether any benefit has accrued to the insane principal and will always endeavor to adjust matters in an equitable

[10] Patterson v. Lippincott, 47 N. J. Law 457; Sparman v. Keim, 83 N. Y. 245.

[11] Gridden v. Maxwell, 34 Kan. 8; Young v. Stevens, 48 N. H. 133; Mutual Life Ins. Co. v. Hunt, 79 N. Y. 541.

manner and put the parties as far as possible in their original positions.

15. **Same subject—Married women.**—At common law a married woman was incapable of making a binding contract on her own behalf, and could not therefore appoint an agent to contract for her. Under modern statutes, however, the general rule is that a married woman is as free to contract as a man. She cannot, by reason of the marriage relation itself, bind her husband by her acts, without his consent, but with regard to her own affairs and property she may appoint agents for any lawful purpose. She may appoint her husband her agent with regard to her own property and affairs with the same effect as if she appointed a stranger.[12]

16. **Same subject—Corporations.**—Corporations are creatures of statute. Their powers are conferred upon them by the state. They must, it is true, act through individual officers and directors, but these officers and directors are not necessarily termed agents. They are in fact the legally appointed and constituted representatives of the corporation and through them the corporation acts. Within the powers granted to the corporation in its charter it is proper for the corporation to appoint agents for any legitimate undertaking, and when the appointment is made through the proper corporate officers having the requisite authority, the corporation is bound.[13]

17. **Same subject—Partnerships.**—Each partner

[12] Weisbrod v. Chicago & N. W. R. Co., 18 Wis. 35.
[13] St. Andrews Bay Land Co. v. Mitchell, 4 Fla. 192.

is the agent of the partnership within the proper limits of the partnership business. The partnership or any member thereof may appoint an agent to do any act within the scope of the partnership affairs and the act of the agent so appointed is binding upon the firm. Indeed it is usual and necessary that partners should have agents and clerks with authority to represent them, and each partner by reason of his relationship with his co-partner is competent and qualified to appoint an agent or agents in the interest of legitimate partnership transactions.[14]

18. **Same subject—Clubs—Unincorporated associations.**—Clubs and unincorporated associations do not come under the rules applicable to partnerships or to corporations. They act through certain officers and committees. These officers and committees may bind the individual members of the club or association who have authorized or assented to the transaction in question. In fixing the liability of the members of these clubs or associations for the act of an alleged agent, it must be shown that the members, sought to be held liable, had duly authorized or assented to the act of the agent. To say that a club or an unincorporated association may be a principal is to aver simply that such an organization may bind itself or its members by a contract made on its or their behalf by an agent when it is shown that the agent was duly appointed for a proper purpose.[15]

19. **Who may be agents.**—Any person other than

[14] Lucas v. Bank of Darien, 2 Stewart 280 (Ala.); see subject, PARTNERSHIP.

[15] Davison v. Holden, 55 Conn. 103.

a lunatic, imbecile, or a child of tender years, may be an agent.[16] The agent, as has been said, is a representative; his act is performed in his representative capacity. The principal is the party who really acts, the agent is simply the medium through whom he acts. It will be seen then that the contract of an agent with a third person is not a contract between the agent and the third person, but between the principal and the third person, and it is therefore stated that as between the principal and third parties it is not obligatory that the agent be one who is necessarily competent to make a contract on his own behalf. It is often possible, therefore, for a competent principal to act through an incompetent agent, that is, through an agent who himself lacks contractual capacity.

20. **Same subject—Infants and other agents.**—Infants, then, may act as agents and it would seem that unless advantage were taken of the tender years of an infant agent by the person dealing with him the principal would have no ground for avoiding responsibility and might also claim the advantage of the infant agent's contract.

It is possible also that a lunatic may be an agent. There are many simple acts of agency that may be performed by a person of unsound mind; but if the weakness of mind be apparent, or if the third party take advantage of the apparent incapacity of the agent, the latter's acts would not be binding upon the principal.

[16] Lyon & Co. v. Kent, Payne & Co., 45 Ala. 656, LEADING ILLUSTRATIVE CASES.

A married woman may also act as agent. Even at common law she could act as agent for her husband or a stranger, but under modern statutes she is freer than ever.[17]

Corporations, within the limits of the powers conferred upon them, may act as agents for individuals, firms, or other corporations;[18] and likewise partners may be given authority to act for a principal.[19]

21. **Joint principals.**—The power of appointing agents may rest in more than one person and the liability for the acts of an agent may be imposed upon more than one. It is not in all cases necessary that all the joint principals concur in the appointment of the agent. Partners are joint principals when the partnership, or any member thereof, appoints an agent within the scope of the partnership business. As has been pointed out, any member of the firm may make a binding contract of agency on the firm's behalf within the proper partnership limitations. But in other cases of joint principals, such as joint tenants, or tenants in common, there is no implied authority in one principal to act for all in appointing an agent.

Voluntary associations and clubs often act through agents in such manner that all of their members are held responsible as joint principals, but only those who confer the authority on the agent or assent to his acts or ratify them are bound thereby.[20]

22. **Joint agents.**—Authority may be conferred

[17] Cox v. Hoffman, 4 Dev. & B. 180 (No. Car.).
[18] Killingsworth v. Portland Trust Co., 18 Ore. 351.
[19] Deakin v. Underwood, 37 Minn. 98.
[20] Ash v. Guie, 97 Pa. St. 493.

on two or more persons jointly or severally. When the authority is conferred upon them severally, one of the agents so appointed may act. When the authority is conferred upon them jointly and the undertaking is of a private nature, all of the agents must join in the execution of the authority unless the principal has manifested a different intention.[21] Where the agency is of a public nature such, for example, as boards of commissioners, public committees, and the like, the rule is that all of the agents must meet and confer and a majority of them may decide. As has been said in a leading case: "It has long been perfectly well settled that where a statute constitutes a board of commissioners or other officers to decide any matter, but makes no provision that a majority shall constitute a quorum, all must be present to hear and consult, though a majority may then decide."[22]

23. **Agent acting for two different principals.**— It is not consistent with the confidence which is necessarily reposed in an agent that he act for both sides in a transaction. He cannot perform his duty with a full measure of justice if he attempts to act for two opposing principals. Even if injury has not resulted to either party the agent is, nevertheless, under a temptation to deal unfairly and the law will not permit him, when he places himself in an inconsistent position, to recover from either principal. This is especially so where neither principal knew

[21] Hawley v. Keeler, 53 N. Y. 114.

[22] First Nat. Bank v. Town of Mount Tabor, 52 Vermont 87; see also Crocker v. Crane, 21 Wend. 211 (N. Y.); same case 34 Am. Dec. 228.

of the double agency.[23] It is also true where only one of the parties had knowledge of the dual relation.[24] But where both parties are informed in advance that the agent represents both sides it would seem that they could not afterwards repudiate the agency; and it is well settled that where the agent acts as a mere middleman and introduces the parties, who afterwards consummate the transaction between themselves, the agent is entitled to recover from both sides, if both sides employed him and agreed to compensate him.[25]

24. **Agency by estoppel.**—A person will be estopped to deny an agency where, by words and conduct, he has represented that another is his agent.[26] The estoppel works in favor of the third party who has dealt in good faith with the agent upon the strength of the representations made by the principal. It is not denied that in order to create an agency the assent of the principal to the formation of the relationship must be shown, but the assent may be manifested by words or conduct on his part which would give rise to an assumption in the mind of a third person that the relationship of principal and agent has been properly entered into. It is enough if the representation be so made that the third party has reasonable cause to believe, and, in fact, does believe, that it is meant to be acted upon, and he does act upon it.

[23] Farnsworth v. Hemmer, 1 Allen 494 (Mass.).

[24] Rice v. Wood, 113 Mass. 133, LEADING ILLUSTRATIVE CASES.

[25] Knauss v. Gottfried Krueger Brewing Co., 142 N. Y. 70, LEADING ILLUSTRATIVE CASES.

[26] Pole v. Leask, 33 L. J. Reports, Eq. 155 (Eng.), LEADING ILLUSTRATIVE CASES.

Agency by estoppel may also exist where an agent acts beyond the scope of his authority; for in the same manner, if the agent acts beyond the authority conferred, and the representations of the principal lead the third party to believe that the agent had the authority necessary to accomplish the act, the principal will be estopped to deny the agency. Thus, where an agent has been authorized to buy goods for cash and the principal has habitually sanctioned his purchases on credit, the principal's conduct is an implied representation of authority to pledge his credit in similar cases. In general, any conduct or action of the principal which has the appearance of holding out another person as his agent for any purpose is a sufficient representation of authority to create an estoppel within the scope of the agency represented to exist.[27]

25. **Agency from necessity.**—Necessity in any particular circumstance is never the basis of agency. The term "agency by necessity" or "agency from necessity" is, in a sense, a misnomer. The most important example of this form of agency is that which gives the power to a wife, in case of non-support, to pledge the credit of her husband in the purchase of necessaries. A husband is obliged to support his wife. His failure in this regard places his wife in a position to make contracts for the purchase of necessaries, and the third persons may enforce the contracts against the husband. The wife is forced by necessity to act as the husband's agent. It is a compulsory agency, or, rather, it would be

[27] Graves v. Horton, 38 Minn. 66; Johnson v. Hurley, 115 Mo. 513.

more precise to say that the law implies the authority in the wife to pledge her husband's credit for necessaries.[28]

It has been recently held in an important case in the state of New York that a husband is liable to one who furnishes necessaries for the support of his deserted wife and infant children; and, furthermore, that the husband is also liable to one who furnishes the wife with money to procure such necessaries. In the same case it was decided that a wife who has applied her separate estate to the discharge of an obligation resting primarily upon her husband, may recover from him the reasonable amounts which she has thus expended out of her separate estate in discharge of his obligation.[29]

26. **Other instances of agency from necessity.**— In many jurisdictions it is held that the parent is under a natural obligation to furnish necessaries for his infant children and if the parent neglect that duty any other person who supplies such necessaries is assumed to have conferred a benefit upon the delinquent parent and the law raises an implied promise to pay on the part of the parent.[30]

Another illustration is the power impliedly conferred on a railway servant in some states, in case of accident and emergency, to employ the services of a surgeon in behalf of the railway company for an injured employee; but this last point should not be considered a general rule, as the states are divided on the proposition.

[28] Benjamin v. Dockham, 134 Mass. 418.
[29] DeBrauwere v. DeBrauwere, 203 N. Y. 460.
[30] Van Valkinburgh v. Watson, 13 Johns. 480 (N. Y.).

It is to be borne in mind that in other matters the mere relationship of husband and wife, or parent and child, does not justify the wife or the husband, or the parent or child, to act for the other as agent, without express or implied authority. The contract of agency between these parties must be made in the same manner as if the particular relationship did not exist between them.[31]

27. **Contract of agency made by ratification.**— If, after an agent has performed an act on behalf of a principal without the requisite authority, the principal then assents to the act, this assent is called a ratification by the principal. The contract of agency may be as firmly made by ratification as by prior express authority. Indeed, ratification, once shown, has the same force and effect as a prior authority. When we speak of the relationship of principal and agent as formed by agreement or contract, we refer to the authority being expressly or impliedly given to the agent prior to the performance of his duty. When we speak of the relationship as being formed by ratification, we assume that the agent has already acted without any authority, but that the principal, having received full knowledge of the material facts, has adopted the act as his own and has thus ratified it. Two cases of ratification may be kept in mind: First, where the agent has no prior authority at all, and second, where the agent has prior authority but exceeds it. When, in the first case, the act is ratified, the ratification operates as an appointment of the agent, as well as

[31] See cases in note 8, p. 182.

a conferring of the authority to do the act ratified. In the second case the ratification operates as an extension of the authority so as to cover the act ratified.

28. **Meaning of ratification.**—The meaning of ratification may be sufficiently gathered from the foregoing paragraph. The Latin maxim which is found in many of the leading cases which discuss this important doctrine in the law of agency, expresses the pith of the subject as follows: *omnis ratihabitio retrotrahitur et mandato priori aequiparatur,* and means: "every ratification has a retroactive effect and is equivalent to a prior command." To ratify is to give validity to the act of another. Ratification operates upon the act ratified in the same manner as though the authority had been originally given. It is the first proceeding by which the principal becomes a party to the transaction.[32]

29. **Elements of ratification.**—The principal elements of ratification are, first, that the act performed by the agent must be performed on behalf of an existing principal; second, that the ratification must be the real assent of the principal to the act performed on his behalf, with full knowledge of the material facts and circumstances connected with the transaction; third, that the principal must be competent to give a binding assent; and fourth, that the act ratified must be legal.

30. **Same subject.**—The contract made by the alleged agent must have been made in the name of,

[32] McCracken v. City of San Francisco, 16 Cal. 591, LEADING ILLUSTRATIVE CASES.

and on behalf of, an existing and ascertainable person. The agent when dealing with the third party deals with him as an agent. The contract therefore sought to be made is one between the supposed principal and the third person. When full knowledge of the material facts and circumstances is brought home to the supposed principal and he adopts the acts of the agent, the contract made by the agent then becomes his own. He may enforce it or he may be held to liability thereunder.[33]

It follows, therefore, that where the supposed principal is undisclosed he cannot afterwards ratify the act of the alleged agent. If X makes a contract on behalf of Y, M cannot take advantage of it by an attempted ratification. If A makes a contract in his own name, but really on behalf of a principal whose name he does not mention and whose identity he does not disclose, the latter cannot ratify it because the third party never made and never intended to make a contract with him. If X is an absolute stranger to Y and has never had any authority for any purpose from Y, but he, nevertheless, makes a contract on behalf of Y, Y may ratify it. If X has received authority from Y to do a particular act, and X not only does that act but performs another act on behalf of Y, in excess of the authority originally given, Y may still ratify the act of X in excess of the authority conferred.

The supposed principal is not bound to ratify the act of the alleged agent. No authority ever having been given to the alleged agent by the supposed

[33] Foster v. Bates, 12 M. & W. 226 (Eng.).

principal, the latter is not called upon to adopt or ratify the unauthorized transactions. But when he does ratify the contract, it becomes his.[34]

31. **Same subject.**—A necessary condition of ratification is that the supposed principal shall have full knowledge of the material facts connected with the transactions of the agent, and that the existence of the contract, its nature and consideration, shall be known to him.[35] It is a general rule that one cannot be said to have ratified a wrongful act simply because he has remained silent when such silence induces no one to act to his prejudice. It is also true that no ratification will be implied from the fact that the principal retains the avails of an agent's act, where the agent acted outside of his actual and ostensible authority and the principal was ignorant that the agent transgressed the authority, and the avails of the agent's act do not include more than the principal was justly and legally entitled to receive. As an illustration it may be mentioned that where A has given authority to B to sell certain bonds for $5,000, and B, without authority and in order to induce a sale, guarantees the soundness of the bonds as an investment, the fact that A receives the purchase price without knowledge of the guarantee on the part of the agent does not bind A to the guarantee.[36] Though a collateral contract may have been the means by which an agent was enabled to effect the authorized contract, still the principal is not

[34] Combs v. Scott, 12 Allen 493 (Mass.).
[35] Wheeler v. Northwestern Sleigh Co., 39 Fed. 347.
[36] Smith v. Tracy, 36 N. Y. 79.

bound by the collateral contract made in excess of the agent's actual or ostensible authority, and not known to the principal when receiving the proceeds.

Where, however, an agent makes an unauthorized contract and after his discharge the principal commences action on the contract, he must assume the whole contract, and cannot enforce or rely only on the parts favorable to him. Once he assumes the contract as made by the agent he is bound by its full terms.[37]

32. **Form of ratification.**—As the authority of an agent may be conferred upon him without any formality in most cases, so the ratification may be made in the same manner. But if the agent performs an act which is required to be under seal, the ratification, in order to be complete, must be by an instrument under seal.[38] A seal always imports some evidence of consideration. While in many instances a seal is superfluous, yet when it is actually used it adds a certain formality to the transaction. If a seal is used unnecessarily it is a general rule that the instrument may be ratified by parol.

In cases coming under the Statute of Frauds, which provides that certain contracts, in order to be valid, must be in writing and signed by the party to be charged therewith or by his duly authorized agent, it is held in some jurisdictions that the ratification of the agent's act must be in writing. In other jurisdictions it is held sufficient if the ratification be by

[37] Shoninger v. Peabody, 57 Conn. 42, 14 Am. St. Rep. 88.

[38] Heath v. Nutter, 50 Me. 378; Hall v. Harper, 17 Ill. 82, LEADING ILLUSTRATIVE CASES.

parol, and the latter would seem to be the more general rule.[39]

33. **What acts may be ratified.**—Any act which one may legally perform may be the subject of ratification. Acts which are void and illegal and contrary to public policy cannot be ratified. Acts, however, which are merely voidable, may be ratified. A tortious act, if ratified with knowledge of the facts, may be capable of ratification. The power to ratify an act is as broad as the power to delegate authority. The test of the rule is that if a principal himself may lawfully perform the act which is sought to be made the subject of ratification, the act may be ratified.

34. **Validity of the act.**—The act to be ratified must be a valid and legal one; one which may be the basis of a proper and enforcible contract. It is a disputed question whether forgery may be the subject of ratification. If A forges the name of B to a promissory note, can B ratify the forgery? It has been held, in a leading Massachusetts case,[40] that where the principal has full knowledge of the facts and circumstances relating to the alleged forgery, he may ratify it. In an Indiana case[41] it was held that forgery could not be the subject of ratification. It was said that one who commits the crime of forgery does not assume to act as the agent of the person whose name is forged, and that where the act constitutes a crime it is difficult to see how the victim of the criminal act may adopt or ratify it, and

[39] McLean v. Dunn, 4 Bing. 722 (Eng.); Johnson v. Dodge, 17 Ill. 433; Long v. Hartwell, 34 N. J. L. 116.

[40] Greenfield Bank v. Crafts, 4 Allen 447 (Mass.).

[41] Henry v. Heeb, 114 Ind. 275.

that, upon considerations of public policy, the act of forgery could not be ratified. But in the Indiana case it was expressly stated that if the supposed principal, by acts or conduct, estopped himself from denying the ratification, and there was a new consideration to support it, the ratification would be binding even though the contract had its inception in forgery. In the LEADING ILLUSTRATIVE CASES accompanying this article an important case in Ohio, to the effect that forgery cannot be ratified, is set out.[42]

35. **Who may ratify.**—Any one who is capable of being a principal, who has the capacity to make a contract of agency, is capable of ratifying an act when it is assumed to be done in his behalf without prior authority. The one who ratifies is the one who is bound by the act of the alleged agent and who can take advantage of that act, and he, therefore, must possess the necessary qualifications of contractual capacity in order to make the contract binding by ratification. Persons under legal disability, like infants and insane persons, may ratify when the disability is removed. A partner may ratify an act done on behalf of the firm within the scope of the partnership business.[43] An agent may ratify an act of a sub-agent if such act falls within the scope of the first agent's authority, and the sub-agent was properly appointed.[44] With regard to corporations, duly appointed officers or directors of the corporation may ratify a proper corporate act done on

[42] Workman v. Wright, 33 Ohio St. 405, LEADING ILLUSTRATIVE CASES.
[43] Forbes v. Hagman, 75 Va. 168.
[44] The Ironwood Store Co. v. Harrison, 75 Mich. 197.

behalf of the corporation. It is sometimes said that a corporation, after it is formed, may ratify the contract of one of its promoters. Strictly speaking, the term ratification would not apply in this instance, for at the time of the promoter's act the corporation was not legally in existence. The courts say, however, that after the corporation is lawfully organized it may adopt and assume the contracts of its promoters and this practically has the same effect as a ratification.[45]

36. **Effect of ratification.**—When ratification is once made it is irrevocable. When the principal has, with knowledge of the material facts, ratified the act of the agent he cannot afterward withdraw. Ratification, as already stated, has the same force and effect as if prior authority had been given to the agent, and the contract, when ratified, becomes the contract of the principal and places him under the same obligations and gives him the same rights as in the case of any other contract made by him.

37. **Same subject—As between principal and third party.**—It is well settled that the third party will be bound by the contract made by the assumed agent upon its ratification by the principal. The contract made by the assumed agent must have been a binding contract or a contract such as could have been made by the principal himself. The question is often presented whether or not the third party may withdraw before ratification. It has been held in a leading English case[46] that ratification by the

[45] McArthur v. Times Printing Co., 48 Minn. 319.
[46] Bolton Partners v. Lambert, L. R., 41 Chan. Div. 295 (Eng.).

principal is effective to bind the other party to the contract notwithstanding that the latter has in the meantime withdrawn his assent; that the ratification relates back to the time of the original transaction between the agent and the third party, and that after the original transaction, the principal had a reasonable time within which to adopt the agent's act. In a New York case[47] it has been said: "The principal, upon being informed of an act of an agent in excess of his authority, has the right to elect whether he will adopt the unauthorized act or not, and so long as the condition of the parties is unchanged he cannot be prevented from such adoption because the other party to the contract may for any reason prefer to treat the contract as invalid and his election once made is irrevocable." This is a somewhat strained situation, because from the moment the assumed agent makes the contract the third party is bound, but the principal is not bound until he ratifies the act. There is a sharp conflict of authority on the proposition, but it may be stated to be the more generally recognized rule that the third person may recede from the contract at any time before ratification, on the theory that prior to the ratification there is no mutuality, and that if one party is free to be bound or not bound, the other must also be free.[48]

The case cited in the last note goes even farther than has been indicated. That case holds that the third party will be released unless he re-binds him-

[47] Andrews v. Aetna Life Insurance Co., 92 N. Y. 596.
[48] Dodge v. Hopkins, 14 Wis. 686, LEADING ILLUSTRATIVE CASES.

self after the principal has sought to adopt the agent's act; in other words, that a second assent is required from the third party.

38. **Same subject—As between principal and strangers.**—Ratification cannot be allowed to defeat the intervening rights of strangers to the transaction. The principal cannot, for example, ratify an unauthorized contract for the sale of property made by an agent and thus defeat a sale of the same property made by himself. Ratification by a principal is only effective so long as he is in a present position to perform or comply with the contract of the agent.

39. **Same subject—As between principal and agent.**—Prior to ratification there is no liability of the principal for the unauthorized act. If the principal never ratifies the agent may incur a personal liability as is explained in the next section. But when the agent's act is ratified it becomes the act of the principal and the agent is no longer bound.[49] If, however, the agent practices a fraud on his principal and thus induces the principal to ratify, the agent is not relieved of responsibility to the principal. Furthermore, where the principal is kept in ignorance of the true facts of the transaction by reason of the negligence of the agent, the agent is not relieved of liability to his principal.[50] While it is true that when the agent has overstepped his authority he becomes liable to his principal for such losses as are the direct and

[49] Triggs v. Jones, 46 Minn., 277.

[50] Bank of Owensboro v. Western Bank, 13 Bush 526 (Ky.).

natural consequences thereof, whether his motives be good or bad, still it is also true that the agent is released from liability when the principal, with knowledge of all the material facts, ratifies the agent's departure from his duty.

40. **Same subject—As between agent and third party.**—Ratification by the principal of the unauthorized contracts made by the agent for him will ordinarily relieve the agent from liability, so far as the unauthorized contract is concerned. There may, however, be instances wherein even after ratification the agent still remains liable to the third party, as where an agent is guilty of conversion. In these cases, even though the principal seeks to ratify the act of the agent, the latter will, nevertheless, remain liable; for the principal having had no authority to commit the conversion he cannot indirectly confer such authority on the agent by ratification.[51] If the principal never ratifies the agent may be personally liable as explained later in Sections 106 and 107.

41. **Delegation of authority by agents.**—There is another Latin maxim in the law of agency—*delegata potestas non potest delegari*—which means that delegated authority cannot be delegated. That is to say, an agent to whom authority is delegated cannot delegate that authority to another.[52] This, however, is not an absolute and positive rule in all cases. In the first place the principal may authorize the agent to delegate his authority and intrust the performance of the duty to sub-agents. Or the

[51] Stephens v. Elwall, 4 M. & S. 259 (Eng.).

[52] Appleton Bank v. McGilvray, 4 Gray 518 (Mass.); Lynn v. Burgoyne, 13 B. Mon. 400 (Ky.).

act itself may clearly require that the authority be delegated to others. When this is the case the agent may, within the proper scope of the employment, appoint a sub-agent and the act of the latter will be binding on the principal. The principal may ratify the act of the sub-agent as well as the act of the agent.

42. **Same subject—Authority involving judgment and discretion.**—Where the act to be performed requires the exercise of personal judgment and discretion or where the principal evidently trusted to a personal performance of the act by the agent, the authority of the agent cannot be delegated to others without the express or implied consent of the principal. The reason of the rule is that the principal relies upon and desires the benefit of a particular agent's judgment, discretion, experience, ability, and skill, and it would be contrary to sound policy to hold that under such circumstances the agent could turn over to another a responsibility which was entrusted to him personally. It is evident that if such power could be delegated a principal would be at the mercy of an unknown and perhaps untrustworthy representative. Nor can the agent assign his contract of agency. The contract is exclusively personal and the principal would not be obliged to recognize the substituted agent. In considering the question of delegated authority, therefore, the courts will look to the nature of the act to be performed by the agent and the customs, if any, prevailing in the particular business or locality.

43. **Same subject—Mechanical and ministerial duties.**—There is usually an implied authority in an agent to appoint a sub-agent where the act to be performed is of a mechanical or ministerial nature, or where it is evident from the very character of the undertaking that the employment of a sub-agent is a necessity.[53] It is a general rule that where the sub-agent is properly appointed he is to be regarded as the agent of the principal. On the other hand, where the sub-agent has not been duly appointed on behalf of the principal the agent is responsible for the sub-agent's acts. If the principal in any event becomes bound to third persons by reason of the acts of an unauthorized sub-agent, the agent is responsible to the principal.

44. **Same subject—Sub-agents.**—Something has been said already under this head. A case in the United States Supreme Court which shows the very striking conflict between a number of states holding one doctrine and a number of states holding a contrary doctrine, bears upon the point of the responsibility of a sub-agent.[54] The doctrine of many of the states, as shown in that case, is that the liability of a bank in taking, at New York, certain drafts from a bank at Pittsburgh for collection from a drawee at Newark, N. J., extended merely to the exercise of due care in the selection of a competent agent at Newark, and to the transmission of the drafts to such agent with proper instructions, and that the Newark bank was not its agent but the agent of the

[53] Williams v. Woods, 16 Md. 220.

[54] Exchange National Bank v. Third National Bank, 112 U. S. 276.

Pittsburgh bank, so that the New York bank was not liable for the default of the Newark bank, due care having been used in selecting that bank.

The contrary doctrine of many other states is shown to be that a bank receiving a draft or bill of exchange in one state for collection in another state from a drawee residing there, is liable for neglect of duty occurring in its collection whether arising from the default of its own officers or from that of its correspondent in the other state or the agent employed by such correspondent, in the absence of any express or implied contract varying such liability. The United States Supreme Court has adopted the latter view.

A lawyer who takes certain claims for collection and sends them to a correspondent attorney out of town is liable for the fraud and embezzlement of the correspondent attorney unless the first attorney has received authority from his client to engage the correspondent.[55]

[55] Cummins v. Heald, 24 Kan. 600.

CHAPTER III.

TERMINATION OF THE RELATION.

45. **Methods of termination.**—As the formation of the relation of principal and agent depends fundamentally upon the will of the parties, the relation in the same way continues and so it is terminated. There are cases, however, wherein the relationship is terminated by operation of law. In general, there are three modes by which the relationship is terminated: First, by express or implied limitation; second, by the act of the parties; and third, by operation of law. When reference is made to the termination of the relationship by limitation it is understood that the period of time for the fulfillment of the agency has been reached, or that the time allowed for the performance of the particular act has passed. In the case of an agent being engaged for a particular purpose the agency comes to an end at once upon his accomplishment of the object.[56]

46. **Same subject—By original agreement.**—Where there is an express agreement between the principal and the agent, limiting the agency to a definite time, the relationship is terminated when the time fixed has been reached. Notice of the termination of the agency under such conditions is

[56] Moore v. Stone, 40 Iowa 259, LEADING ILLUSTRATIVE CASES; Ahern v. Baker, 34 Minn. 98.

generally unnecessary. Should the parties, however, continue their relationship by mutual consent after the expiration of the stated period it will be presumed that the original contract is continued for a further like period. But the contract between the parties must be looked at and, as in all other contracts, the element of intention of the parties thereunder will play a strong part in its construction.

47. **Same subject—By subsequent agreement.**—An agreement made between the parties subsequent to the formation of the relation, cancelling and rescinding their original agreement, will, of course, put an end to the agency. As in other agreements there must be present in the rescinding contract the essential element of consideration. So, too, if either party abandons the contract of agency, or his rights thereunder, this will be deemed sufficient to terminate the relation.

The subsequent agreement will not be effectual, however, to terminate the agency if the power conferred on the agent be coupled with an interest.[57]

48. **Same subject—By revocation of authority.**—Where an agency has been properly created it is a general rule that it may be terminated by the principal by revocation of the authority conferred and by the agent by renunciation of the appointment. There are certain exceptions which will be noted below. It is the general rule that all simple agencies, so called, are revocable at the will of the principal. But in cases of simple agencies the principal cannot always relieve himself from the dam-

[57] Chambers v. Seay, 73 Ala. 372. See also § 51.

ages, if any, incurred by a breach of the contract of employment; and vice versa the agent, notwithstanding his renunciation, may be held responsible for damages to the principal. Simple agencies are distinguished from agencies or powers "coupled with an interest," as will be shown.

If I authorize a real estate agent to sell my house for $5,000 and agree to pay him a commission of 2½ per cent at the time of sale, I may revoke the agency and cancel the authority at any time without incurring liability to the agent. If, however, I say to the agent that I desire him to advertise the sale of the house in certain newspapers and that I will pay him his expenses as well as his commission, I shall be liable to the agent for his expenses if I revoke the agency before sale.[58]

49. **Same subject.**—The principal's right to revoke is distinct from his power to revoke. He may, in many cases, exercise the power of revocation, but he may be right or wrong in so doing; that is, right or wrong in the eyes of the law. A principal is generally in a position to so exercise his power as to deprive the agent of the means and authority of accomplishing the purpose of the agency. In the cases of contracts of employment where the contract covers a period of a year, for example, at a stipulated weekly, monthly, or yearly compensation, the principal has the power to terminate the employment by discharging the agent but he has not a complete legal right to do so, for in an action brought by the agent under the contract the prin-

[58] Blackstone v. Buttermore, 53 Pa. St. 266.

cipal will be compelled to pay damages for the breach thereof.

As held in the Pennsylvania case cited in footnote 58, even where the principal confers authority upon an agent by power of attorney to sell lots and the power contains a clause that the same is irrevocable prior to a certain day, nevertheless the principal has the power to revoke the agency prior to the expiration of the time limit. The agent, however, has a right of action for damages under the contract.[59]

Where a positive and absolute contract to employ an agent for five years is made it must be carried out. If the principal exercises his power to revoke the contract, the agent may hold the principal liable thereunder even where the principal was obliged by law to discontinue his business in the particular state.[60]

It has been held, as has already been indicated, that where a contract of employment for a specified period, say for one year, is made and at the expiration of the period the parties continue their relations as under the original contract, the law will presume a continuance for another year, and a revocation of the agent's employment will subject the principal to damages.[61]

50. **Same subject—The element of good faith.**—It was laid down in an important case[62] that the question of good faith on the part of the principal

[59] Blackstone v. Buttermore, 53 Pa. St. 266.
[60] Lewis v. Atlas Mutual Life Ins. Co., 61 Mo. 534.
[61] Standard Oil Co. v. Gilbert, 84 Ga. 714.
[62] Sibbald v. Bethlehem Iron Co., 83 N. Y. 378.

plays a strong part in deciding the question of his liability or non-liability in revoking the agency. In the case mentioned the agent had been employed to sell certain railroad supplies on a commission basis, and after great labor and expense on his part he was unsuccessful. The agency was terminated and shortly afterwards the principal dealt with certain parties with whom the agent had been previously negotiating. It was determined that if the act of the principal in revoking the agent's authority was in good faith the agent could not recover. It was said that a broker always works on a contingency and that his reward comes only with success. It matters not, it was said, that ultimate good resulted from the efforts of the agent to the principal, after the termination of the agency. The controversy was decided on the particular ground that, the agency being a simple agency, it was revocable at the will of the principal acting in good faith.

51. **Same subject—Power coupled with an interest.**—When the power given to an agent is coupled with an interest the principal has neither the right nor the power to revoke the agency. What is a "power coupled with an interest?" In a leading case upon the subject[63] it is said that such an interest "must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing. * * * A power coupled with an interest is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we

[63] Hunt v. Rousmanier's Adm'rs, 8 Wheat. 174 (U. S.).

are to understand by the word interest an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases when the interest commences and therefore cannot, in accurate law language, be said to be coupled with it."

The point may be illustrated in a simple way. If I employ an agent to sell a quantity of lumber at a particular price and I agree to pay him a commission of 20 per cent upon the consummation of the sale, I am not giving the agent an interest in the subject matter of the agency, namely, in the lumber, but simply an interest in the result of the sale. This, therefore, is a simple agency and is revocable at the will of the principal. I am not conferring a power upon the agent and at the same time giving him an interest in the subject matter of the agency and it is not, therefore, a power coupled with an interest. If, however, I word my contract with the agent so as not only to give him a power to sell but also to transfer and assign to him a particular interest in the lumber itself, as compensation for the work he has performed or is to perform, I am giving him an interest in the very subject matter of the agency and so the agent has a power coupled with an interest. I have neither the right nor the power to revoke this authority. The agent has an interest in the subject matter and may assert it and he cannot be deprived of his rights thereunder by an attempted revocation.[64]

[64] Walker v. Denison, 86 Ill. 142.

52. **Same subject—Notice to third persons.**—In the event that an agency is revoked by the principal, the latter is obliged to give notice of such revocation to third persons who have dealt with the agent knowing of the relationship. It is a familiar principle of law that when one has constituted another his agent to carry on his business, the authority of the agent to bind his principal continues after an actual revocation until notice of the revocation is given or brought home to persons who have been accustomed to deal with such agent.[65]

Where one has dealt with a general agent knowing him to be such he will be justified in dealing with him again in the absence of notice of revocation from the principal.[66] With regard to special agencies it is said that notice of revocation of the authority is not necessary unless the agent has already entered upon the performance of his duty; for the special agent has not, in previous transactions, been held out as the legally authorized representative of the principal and he has generally but one specific transaction to carry out.

53. **Renunciation by agent.**—As the principal generally has the power to revoke except in the case of a power coupled with an interest, so the agent has the power to renounce his appointment. The renunciation must, of course, be communicated to the principal in some manner, but it may also be implied from the conduct of the agent as by his abandonment of the agency.[67] The principal is entitled to

[65] McNeilly v. Continental Life Ins. Co., 66 N. Y. 23.
[66] Claflin v. Lenheim, 66 N. Y. 301.
[67] Stoddart v. Key, 62 How. Pr. 137 (N. Y.).

reasonable notice of renunciation and often where the agent is not bound by a definite contract his sudden determination to renounce may result in serious loss to the principal. The agent is liable for damages where he renounces in violation of an express contract for a definite period or for the accomplishment of a particular purpose. If, however, his renunciation is not in breach of his contract he will be entitled to compensation.[68]

54. **Termination by operation of law.**—The rules applicable to the termination of the relationship of principal and agent by operation of law are grouped generally under four heads, as follows: First, by death; second, by insanity; third, by bankruptcy; fourth, by the outbreak of war between the country of the agent and the country of the principal.

55. **Same subject—Death.**—As a general rule all simple agencies are terminated by the death of either the principal or the agent. There must in all cases be in existence a principal who is to be bound, otherwise there cannot be an agency. As an agency is a personal trust and authority cannot be delegated without the express consent of the principal, so upon the death of the agent the authority cannot be continued by another agent and the relationship between the principal and the agent is terminated. Where there are two or more joint principals usually the death of one terminates the agency. Even where the agent and the third party are ignorant of the death of the principal, nevertheless, where the agency is a simple one, the death of

[68] Britton v. Turner, 6 N. H. 481; McClay v. Hedge, 18 Iowa 66.

the principal, *ipso facto,* terminates it.[69] If, however, the power be one coupled with an interest it survives the person giving it and may be executed after his death.

56. **Same subject—Insanity.**—With regard to the insanity of the principal it is a general rule that the same revokes the agency for the reason that there is no competent principal in existence on whose behalf the agent may contract. The insanity of the agent, of course, occurring after his appointment is a ground for the termination of the relation, for third parties dealing with an agent *non compos mentis* cannot make binding contracts through him with the principal.

If the power be one coupled with an interest, the insanity of the principal does not terminate the agency, or if third parties, before the insanity of the principal, have parted with anything of value in dealing with the agent in good faith, relying on an apparent authority of the agent, the insanity of the principal does not necessarily terminate the agency, and the third parties' rights will be preserved by the court. It seems to be held in some jurisdictions that an adjudication that a principal or agent is insane would amount to constructive notice to all persons of the termination of the agency.[70]

57. **Same subject—Bankruptcy.**—As the bankruptcy of an individual by force of law places his assets and property in the custody of the court for the benefit and protection of his creditors, it follows

[69] Weber v. Bridgman, 113 N. Y. 600, LEADING ILLUSTRATIVE CASES.
[70] Davis v. Lane, 10 N. H. 156.

that the bankruptcy of the principal terminates the agency so far, at least, as relates to rights or property of which the principal is divested by the bankruptcy. The general rule in this instance follows, that if the power be one coupled with an interest the bankruptcy of the principal does not terminate the relation of agency with regard to that particular power.[71]

The bankruptcy of an agent may not always terminate the agency, for, as has been repeatedly pointed out, the agent deals simply in his representative capacity and his bankruptcy will not always interfere with the performance of his duty. His bankruptcy, however, does in general interfere with and prevent his receiving money of his principal; but with regard to other acts not connected in any way with his personal estate the agency would continue.[72]

Some text writers on the subject make it appear that the termination of the agency by the bankruptcy of the agent seems to result from the implied intention of the principal rather than from the bankruptcy itself. Still there seems to be no good reason why the bankruptcy of the agent should prevent him from making a binding contract on behalf of his principal.

58. **Same subject—War.**—Every kind of trading between two countries at war is prohibited. War, therefore, between the country of the agent and the country of the principal terminates or, at least, sus-

[71] Story, Agency, § 482.

[72] Audenried v. Betteley, 8 Allen 302 (Mass.).

pends the agency during the continuance of hostilities. It was said by Judge Bradley of the United States Supreme Court, in the case of Insurance Co. v. Davis, 94 U. S. 425 (1877):

"That war suspends all commercial intercourse between the citizens of two belligerent countries or states, except so far as may be allowed by the sovereign authority, has been so often asserted and explained in this court within the last fifteen years that any further discussion of that proposition would be out of place. As a consequence of this fundamental proposition it must follow that no active business can be maintained either personally or by correspondence or through an agent by the citizens of one belligerent country with the citizens of the other." But it has been held in a New York case[78] that the suspension of commercial contracts by war has no application to life insurance contracts unless the policy insures against death while the insured is engaged in the military service of the enemy's country.

59. **Same subject—Marriage.**—While at common law the marriage of a woman would revoke an agency as to her separate estate, this result would not follow under the modern statutes of most jurisdictions affecting the rights of married women. It has already been shown that married women have practically the same rights as men. The marriage of an agent has in general no bearing upon the relationship of principal and agent. The marriage of a principal has likewise no effect toward terminat-

[78] Sands v. New York Life Insurance Co., 50 N. Y. 626.

ing an agency. It is sometimes said, however, that in particular cases the marriage might affect the agency as, for example, where a man authorizes an agent to sell his lands and before the sale he marries. By the marriage his wife acquires a dower right in his real estate and this dower right must be released before a complete sale will become effectual.[74]

[74] Henderson v. Ford, 46 Texas 627.

CHAPTER IV.

THE AUTHORITY CONFERRED; ITS NATURE AND EFFECT.

60. **Express authority.**—It has been pointed out that the authority of the agent may be express or it may be implied. The manner in which the authority is conferred is important, because of the consequences which follow upon whether the one method or the other is used.[75] With regard to express authority there is little occasion for uncertainty as to its extent. The time and place and manner of executing the authority, and the conditions and limitations imposed, are clearly defined. The extent of the express authority may be general or special. There can be little doubt of the limits of the agent's authority when the appointment is in writing and is unequivocal, but it is to be borne in mind, as has been stated heretofore, that express authority to an agent may be given by parol as well as in writing. Persons dealing with an agent who has been given express authority are bound by the extent and limitations of the authority conferred.[76] When third persons deal with an agent knowing that his authority has been conferred in writing or has been given to him by an instrument under seal, they are bound

[75] Loudon Savings Fund Society v. Hagerstown Savings Bank, 36 Pa. St. 498, LEADING ILLUSTRATIVE CASES.

[76] Porges v. U. S. Mortgage & Trust Co., 203 N. Y. 181; Craighead v. Peterson, 72 N. Y. 279.

by the written or sealed instructions. The burden of proof is on the third party dealing with an agent to show that the agent has acted within the scope of the authority conferred.

61. **Implied authority.**—Authority is very frequently left to be inferred or implied from the words and conduct of the principal or from the circumstances surrounding the particular case. Care must be exercised not to infer too much from the known facts, and in attempting to infer authority of an agent by reason of the words, conduct or actions of the principal, a reasonable and fair construction must be placed upon these facts and circumstances and the courts will not permit a strained and unreasonable construction. It has been stated that the authority which is to be implied cannot exceed the natural and legitimate interpretation of the facts from which it is inferred. Implied authority cannot result from mere presumption or hazard or from matters of convenience. Certain implications are permissible even where the authority given to an agent is express, as, under an express authority, an agent has implied authority to do whatever is reasonable and necessary in the proper execution of his agency. And so also an agent acting under express authority has implied authority to act according to known usages and customs.

62. **General and special authority.**—It has been shown that the general agent is distinguished from the special agent and that the distinction arises by virtue of the extent of the authority conferred. General authority as well as special authority may

be expressly given or it may be implied from facts and circumstances. The authority is general where the principal has represented that the agent is authorized to act in a general manner in relation to some matter, or in relation to a particular class of business. The authority is special when the principal has authorized the agent to act in a particular matter or in a particular manner in accordance with specific instructions.[77]

63. **Distinction between authority and instructions.**—When authority is conferred upon an agent the principal may properly impose certain restrictions and limitations upon the exercise of the authority, and such restrictions and limitations will be binding upon such third persons as have notice of them. When authority is once conferred the agent may act within the reasonable and proper limitations of that authority. When secret instructions or limitations are placed upon the authority and are unknown to the third persons with whom the agent deals, such secret instructions or limitations are not binding upon the third party, and when the agent acts within the proper and reasonable boundaries of the authority conferred he is, so far as the third persons are concerned, properly performing his duty.[78] Secret limitations and instructions, when not consistent with the authority conferred, are likewise not binding upon the third party. Where the agent transgresses his instructions or goes beyond the limitations of his authority, he nevertheless will

[77] Butler v. Maples, 9 Wall. 766 (U. S.), LEADING ILLUSTRATIVE CASES.
[78] Towle v. Leavitt, 23 N. H. 360.

bind his principal as to third parties when his acts are within the reasonable scope of the authority conferred or are such as the principal has permitted third parties to conclude are within the scope of that authority.[79]

It is not to be denied that the instructions given to an agent constitute, at times, the very authority itself. But instructions which go beyond the ostensible and apparent authority of the agent are usually not binding upon third persons who are ignorant of the instructions. It is not always what the principal says, but what he does or what he permits to be done, which defines the authority of the agent. Instructions which are contrary to known usage and custom are not binding upon third persons. The rules of conduct which a principal seeks to impress upon the exercise of the authority of his agent are not binding upon third persons, especially where such rules are inconsistent with law, or are unusual and arbitrary. Secret instructions may be proper as between the principal and the agent, but they cannot be expected to affect third persons who are ignorant of them, unless they be reasonable.[80]

64. **Extent of general and special authority.**— Where the agent has received general authority all persons dealing with him are justified in concluding that he may do whatever is usual in the exercise of his authority. The rights of third persons cannot be impaired or affected by the fact that the principal has placed secret limitations upon the exercise

[79] Bryant v. Moore, 26 Maine 84.
[80] See case in note 78, p. 221.

of the authority. With regard to the extent of special authority conferred upon the agent, it is generally true, from the very nature of the authority, that the principal may restrict the authority by certain limitations. The agent being a special agent and his authority being a special authority, the third party should be more careful in dealing with him, as all proper limitations placed upon that authority by the principal are binding upon the third person.[81] If, however, the principal has by acts and conduct permitted it to be inferred that the agent has greater authority than actually given, the limitations will avail him nothing.

Generally speaking, therefore, unknown limitations placed upon the authority of the general agent or placed upon an agent who has been given general authority are not binding on third persons when the limitations unreasonably restrict the authority. Whereas with regard to special agents or agents who have been given special authority, limitations which are consistent and proper in the particular case, whether known or unknown to the third person, are binding upon the latter.

65. **Construction of the authority—When in writing.**—The agent is under obligation to conform strictly to the authority conferred. He impliedly undertakes to obey the instructions given to him by his principal and he is liable to his principal in damages for any loss occasioned by his breach. The object in the mind of a third person in dealing with an agent should be to ascertain the intention of the

[81] Hubbard v. Ten Brook, 124 Pa. St. 291.

principal in conferring the authority on the agent.[82] It is true this is not always an easy matter. The question therefore is one of construction and interpretation.

When the authority is in writing it is usually conferred by what is known as a power of attorney. This is an instrument wherein and whereby the principal employs or authorizes the agent who is named, to do and perform a certain act or a certain class of acts; it is usually signed and witnessed or acknowledged by the principal. No particular form of power of attorney is prescribed. When it is delivered to the agent it constitutes his authority. The first general rule to be applied in the case of a power of attorney is that it is to be strictly construed. Not that there is to be any unfair construction of it, but it must appear on the face of the instrument by a reasonable and fair interpretation of the whole that the authority is to be found there. The rule may be stated that a written power of attorney is strictly construed and confers only such authority as is expressly stated or as is permitted by necessary implication. When general words are used following the particular authority conferred they do not add anything to the particular authority, but denote only that the agent may do any act necessary to accomplish the particular purpose.[83]

66. **Same subject—When not in writing.**—When authority is conferred other than by a power of attorney the general rule is that the authority is

[82] Kornemann v. Monaghan, 24 Mich. 36.
[83] Craighead v. Peterson, 72 N. Y. 279.

to be liberally construed. That is to say, fair inferences may be drawn from the authority with a view toward accomplishing the object at hand. The question is one of intention, and reasonable inferences are permitted to be drawn when the same are consistent with the authority conferred and are not contrary to the known usages of a particular locality or of a particular business. Sometimes it is said that letters or telegrams from a principal to an agent are liberally construed for the reason that they are drawn in a hurried manner and leave a great deal to inference; but this liberality of construction is in favor of the third party, the letters or telegrams being strictly construed as against the principal. Where a letter, however, purports to be in the nature of a power of attorney it would seem that the same rules would apply as to a formally drawn power of attorney.[84]

67. **Same subject—Ambiguous authority.**—It not infrequently happens that the terms which express the authority conferred are construed in one manner by the principal and in another by the agent, or it may happen that the terms of the authority conferred are capable of more than one construction. In such cases good faith seems to be the test in the construction of the authority. If the act done by the agent is not done in bad faith and seems fairly to be warranted by the terms of the authority, it is generally held that the principal is bound, although the construction placed upon the authority by the agent was not intended by the principal. The prin-

[84] Wood v. McCain, 7 Ala. 800.

cipal must stand the consequences if he fails to make his instructions clear.[85] The ambiguity in the authority conferred may arise from the words of a written power of attorney as well as from those of an oral authority; but in general a reasonable and fair interpretation of either written or parol authority, where the parties act in good faith, will be upheld.

68. **Construction of implied authority.**—When authority in an agent is implied from the acts and conduct of the principal, the general rule of construction is that the authority cannot be made broader than fair inferences will warrant. The authority inferred must be no greater than what naturally follows from the conduct and acts of the principal. It having been established that an agency has been created by implication, it is necessary to properly interpret the authority so inferred. The principal having neglected to limit the authority of his agent, or having permitted the agency to arise by his acts and conduct, it is but proper that third parties should have the benefit of any doubt and should be permitted to construe the authority strictly against the principal. If the agency arises by implication from acts done by the agent with the tacit consent or acquiescence of the principal, it is to be limited in its scope to acts of a similar nature; if it arises from the general habits or course of dealing between the parties it must be confined in its operation to dealings of the same kind; if it arises from the previous employment of the agent

[85] Ireland v. Livingstone, L. R. 5 H. L. 395; LeRoy v. Beard, 8 How. 451 (U. S.); Winne v. Niagara Fire Insurance Co., 91 N. Y. 185.

in a particular business, it is, in like manner, to be limited to that particular business. In other words, an implied agency is not to be extended by construction beyond the obvious purpose for which it is apparently created.[86]

69. **Construction of particular powers.**—In the broad and complex business dealings of the present day there are many powers which may be conferred upon agents. There are peculiar rules applicable to the construction of certain powers. It would be manifestly impossible within the scope of this article to treat of every power which may be conferred upon an agent and to explain the rules which may have application to each particular power. It will be sufficient if we treat of the more common powers conferred and the construction placed upon these powers, and it is apprehended that the general principles may be applied in determining what rules of construction should be used and relied upon in determining the interpretation to be placed upon the power conferred upon the agent.

70. **Agent authorized to sell land.**—It is of frequent occurrence that an agent is invested with authority to sell his principal's real estate. There is a distinction to be noted between the authority given to an agent to sell and the authority given to an agent to offer for sale. When the authority is given to an agent to sell land in the sense that he is authorized to convey it, he must be invested with the power by a document in writing. In states where there are recording acts and the property

[86] McAlpin v. Cassidy, 17 Tex. 449.

stands on the record in the name of the principal, it is necessary that the power to the agent be in writing, and subscribed and acknowledged by the principal, and recorded in the same office where deeds are recorded. Most states have recording acts. The statute in each state referring to real property must be looked up, and in nearly all the states the Statute of Frauds is in force, whereby it is generally provided that a valid contract for the sale of real estate must be subscribed by the seller or his lawfully authorized agent. As it is not necessary in most jurisdictions that a contract for the sale of land be under seal, the principal may give an agent parol authority to make the contract. The principal then carries out the contract by executing a conveyance to the third party. The principal therefore may by parol authorize his agent to sell his property, but the agent cannot by parol make a binding contract to sell the property. Merely placing one's property in the hands of a broker for sale gives the agent authority to offer the property for sale, but does not authorize him to convey it or, generally, even to make a contract to convey it. A broker's duty ends when he procures a purchaser at the price stated by the principal. A deed of conveyance made by an agent without the authority of a written power of attorney passes no title. But it has been held that where the agent had authority in writing to sell, his conveyance, though ineffectual to pass title, was a good contract to convey, and so the principal was directed to specifically perform the contract.[87]

[87] Lyon v. Pollock, 99 U. S. 668.

A power of attorney from two or more principals, joint in form, does not confer authority on the agent to act in relation to the property of one of the principals alone. A written power of attorney to an agent to sell the real estate of the principal and execute a deed without restrictions is construed to give the agent authority to convey with a warranty clause where that is the usual method of conveyance.[88]

71. **Agent authorized to sell personal property.**— It is not necessary that a power to sell personal property be conferred by a written instrument. Authority to sell is not to be inferred from the mere fact that the agent has possession of the property. It is true, however, that where the owner has clothed an agent not only with possession, but with the indicia or evidences of ownership, he will be bound by a sale. Authority to sell personal property may be express or it may be implied from the acts or conduct of the principal. Such authority implies the power in the agent to make the necessary and usual terms and conditions of sale; and generally it also places in the agent the power to warrant the principal's title, especially where this is usual and customary. Furthermore, possession of the property by the agent authorized to sell it implies authority on the agent's part to fix the purchase price. Mere authority to sell does not warrant the third party in paying the agent if the property is not delivered at the time of the sale.[89] If the agent has authority to sell for cash, he cannot sell on credit; nor can he

[88] LeRoy v. Beard, 8 Howard 451 (U. S.).

[89] McKindly v. Dunham, 55 Wis. 515, LEADING ILLUSTRATIVE CASES.

exchange the property for other property. Once the agent has made a sale he has generally no authority to rescind it; the principal is bound by it and he alone can rescind. It has been held that oral warranties made by an agent in the sale of an automobile, which warranties were also contained in a printed circular shown by the agent in making the sale, this circular having been issued at the instance of the principal, were binding upon the principal.[90]

Where an agent is entrusted with personal property with no direct or implied authority to sell the same he cannot pass good title to a purchaser even though the purchaser act in good faith, but where there was an evident intention to make a sale an innocent purchaser will be protected.[91]

72. **Agent authorized to purchase.**—An agent given authority to purchase goods for cash cannot purchase on credit unless it be the usage and custom in the particular trade or business or in the particular locality or unless he have express power to buy upon credit.[92] An agent authorized to buy goods cannot buy from himself, as an agent authorized to sell cannot sell to himself.[93] This would be contrary to the fiduciary relationship existing between principal and agent, and to the rule that one in such fiduciary relationship cannot take advantage of his position to the detriment of the other party. It is true that where an agent is authorized to buy and he is not furnished with the necessary funds

[90] Lewis v. Pope Motor Car Co., 206 N. Y. 402.
[91] Smith v. Clews, 105 N. Y. 283.
[92] Komorowski v. Krumdick, 56 Wis. 23.
[93] Heckscher v. Edenborn, 203 N. Y. 210.

he may buy on credit. He may also agree upon usual and reasonable terms of purchase.

73. **Authority to make negotiable paper.**—In order that an agent may properly bind his principal by the making or endorsement of negotiable paper he must have authority for that purpose. Such authority does not arise by reason of the relationship of principal and agent. The authority is not to be lightly inferred. It is not of course necessary that the authority to make or endorse negotiable paper be in writing. Where there is doubt the authority is strictly construed as against the agent and the third party. So an agent in buying goods, cannot, without authority from his principal, issue negotiable paper for the purchase price. The fact that the authority to issue or endorse negotiable paper is strictly construed in favor of the principal is not to be considered a denial of the proposition that the authority may be lodged in the agent by implication.[94] The acts and conduct of a principal which would amount to an estoppel in connection with the issuing or endorsement of commercial paper would be as binding upon the principal in this relation as in any other matter. When payment is made to an agent by check and the agent has been in the habit of endorsing the principal's name on checks and depositing them in his bank account, and he has accounted from time to time to his principal and the principal has full knowledge of the fact of the agent's receiving and endorsing checks, it has been held that payment by check to the agent in a

[94] Jackson v. National Bank, 20 S. W. Rep. 802 (Tenn.).

subsequent transaction is payment to the principal. But generally speaking an agent has no right to endorse a principal's name without an express or implied authority.[95]

74. **Agent to manage business.**—An agent to manage a business can only bind his principal for whatever acts are done in the regular and known and proper transaction of that business. It is generally held that an agent employed to manage a retail business has no authority to sell out the entire business in one transaction. Nor has such agent authority by reason of his position to issue or endorse negotiable paper. His authority in this connection must be clearly established. There is no authority by implication in the agent to borrow money on behalf of the principal in connection with the business or to mortgage the principal's property, and it is not permitted the agent to make any unusual contract or to enter into any undertaking or obligation outside of the usual scope of the business.[96]

75. **Execution of the authority by the agent.**—It is the general duty of the agent to act within the scope of the authority conferred upon him by the principal and to act in the name of and on behalf of the principal. It has already been stated that when the agent acts beyond the authority conferred he cannot bind his principal. It is often a difficult question to ascertain just when an agent has exceeded his authority. The burden of proof is always upon the person dealing with the agent to show that

[95] Morrison v. Chapman, 155 App. Div. 509 (N. Y.).
[96] Brockway v. Mullin, 46 N. J. Law 448.

the agent had the requisite authority to act in the manner in which he acted. When the authority given to an agent is in writing it is easy to ascertain how far the agent might go. When the authority is not in writing there are various means open to the third party to inquire as to the extent of the agent's authority, and under these circumstances he deals with the agent at his peril.[97]

The agent should act in all cases so as to give his principal the benefit of his acts and not to seek any personal benefit to himself and he should also be careful to perform his duty so as to bind his principal and not himself personally. The agent, it may be added, generally speaking, is never held personally responsible where he represents himself as agent of a known principal and acts on behalf of the principal within the scope of his authority. The agent may not always escape liability for the negligent performance of his duty. Where there is a complete execution of the power conferred upon him but he goes farther and does something which is improper, the execution will be good, and the excess acts only will be void. If, however, there is not a complete execution of the power the act will not be binding upon the principal; as where an agent was given authority in writing to sell the lands of his principal subject to a lease, and he agreed to sell free and clear, there was not a complete execution of the power conferred and the agreement was not binding upon the principal.[98]

[97] Mullen v. Quinlan & Co., 195 N. Y. 109, LEADING ILLUSTRATIVE CASES.
[98] Thomas v. Joslin, 30 Minn. 388.

76. **Same subject—Instrument under seal.**—When an agent is to perform an act by an instrument under seal his authority should be conferred by an instrument under seal. The instrument which he makes under seal as an agent must be executed by him in the principal's name. An agent signing his own name to a sealed contract is personally liable and the principal cannot be held liable by the third party, even though the third party knew the signer was an agent; the agent is liable and bound to perform irrespective of whether or not the contract could be enforced against his principal.[99]

77. **Same subject—Simple contracts.**—In oral contracts, as distinguished from written contracts, it is always a question of fact as to who are the actual contracting parties. Even though one is an agent, still he may in fact make himself the other party to a contract with a third person. Where, however, the contract is written, but is not sealed and is not negotiable, like a note, then if the agent signs his own name to the contract so as to appear by the writing to be the other contracting party he will be personally bound, even though he intended to bind only his principal. This is because parol evidence is not admissible to vary a written contract and thus relieve a person from liability who appears by the writing to be liable. But even though the written contract appears on its face to be the agent's personal contract, still since the agent is in legal theory the same as his principal parol evidence is admissible to enable the principal

[99] Briggs v. Partridge, 64 N. Y. 357, LEADING ILLUSTRATIVE CASES.

to take advantage of the contract or, in case the third party so elects, to hold him liable on the contract.

Where a contract not under seal is made by an agent in his own name for an undisclosed principal, whether he describes himself as agent or not, either the agent or principal may sue upon it. Parol evidence is admissible under a simple contract to charge an unknown principal, but not to discharge the actual signer.[2]

78. **Same subject—Negotiable instruments.**—The rules with regard to the execution of negotiable paper by an agent, while embodying some of the principles already referred to, have their own peculiar application. It is of the utmost importance that checks, promissory notes, drafts, bills of exchange, and other negotiable instruments should clearly and definitely show upon their face who are the parties thereto. In order therefore that the principal may be bound it is necessary that the paper shall show upon its face who the principal is, and that his signature thereto is his signature, although made by the hand of his agent. It is not sufficient that the principal be named on the face of the paper; it must also appear that the promise is his, and that the agent signs for him. If the signature is not properly made the agent cannot escape personal liability simply by adding the word "agent." The principal must be named and the signature must be the principal's. With regard to the signing of notes by officers of cor-

[1] Gordon Malting Co. v. Bartels Brewing Co., 206 N. Y. 528.
[2] Ludwig v. Gillespie, 105 N. Y. 653.

porations the general rule is that the corporate name should be signed thereto and following this the name of the official and a designation of his office. Where, however, the note is subscribed by the name of an officer of the corporation, to which name he affixes the title of his office, the result is not always the same.[3] While in some jurisdictions it is held that the note would be a note of the individual officer, it is nevertheless now considered to be the general rule that the signing in the form mentioned presents an ambiguity arising out of the manner of coupling the names of the natural person and the corporation, and it has been held to be open to the parties to introduce extrinsic testimony to disclose the intention of the parties.[4]

[3] Tucker Mfg. Co. v. Fairbanks, 98 Mass. 101.
[4] Reeve v. First National Bank, 54 N. J. Law 208.

CHAPTER V.

LEGAL EFFECT OF THE RELATION AS BETWEEN PRINCIPAL AND AGENT.

79. **Obligation of principal to agent.**—The obligations primarily resting upon a principal toward his agent are to pay him his commissions, salary or compensation, and to indemnify him against loss sustained in the performance of his duties. He is also, like other employers, obliged to protect the agent from injury in prosecuting his employment. The agent may bring action against the principal for his compensation, and he may sue to recover damages for injuries sustained by reason of the principal's negligence. The law further protects the agent in securing his compensation by allowing him a lien on the property or money of his principal when in his possession.[5]

80. **Same subject—Payment of compensation.**—What the compensation of the agent may be depends upon the contract made between the parties. An express agreement as to compensation is not necessary. Where services have been rendered by an agent at the request of the principal the law will imply a promise on the part of the principal to pay the reasonable value thereof. But the services must have been rendered under such circumstances that the duty and intention to pay for them may be fairly

[5] Muller v. Pondir, 55 N. Y. 325.

inferred.[6] When the agreement as to compensation is express it is conclusive. The ratification by the principal of an unauthorized act likewise gives the agent the right to compensation.[7]

The amount of compensation. Where the parties have agreed upon the amount of compensation the agreement will be followed.[8] Where no amount has been agreed upon, the law, as stated above, will imply a promise to pay a reasonable sum for the services rendered, and in determining the reasonable value of services, the opinions of witnesses familiar with the matter will be duly considered. Agents who work upon a contingent basis are entitled to compensation only in the event of success. Should the agent's authority be revoked the agent may nevertheless be entitled to recover compensation or damages depending upon the nature of the employment and whether the principal has rightfully or wrongfully terminated the agency.

81. **Same subject—Agent's reimbursement and indemnity.**—An agent is entitled to be reimbursed for all proper outlays made and expenses incurred by him in the course of his employment for the benefit of the principal. It follows that this right to reimbursement does not extend to expenses incurred through his own fault or negligence.

The agent is entitled to be indemnified by the principal against the consequences of all lawful acts performed by the agent in the course, and within the

[6] Seals v. Edmondson, 73 Ala. 295; Sussdorff v. Schmidt, 55 N. Y. 319, LEADING ILLUSTRATIVE CASES.

[7] Wilson v. Dame, 58 N. H. 392.

[8] Wallace v. Floyd, 29 Pa. St. 184.

scope, of his agency.[9] The loss sustained by the agent must be assumed by the principal. This is so whether the principal has agreed to thus indemnify his agent or not. The law casts the duty upon the principal as a necessary consequence of the relationship. But if the act of the agent is beyond the scope of the authority conferred, or is done in an unlawful undertaking, he, of course, is not entitled to be indemnified.

82. **Same subject—Agent acting for different principals.**—It has already been pointed out that an agent cannot represent both sides, that is to say, he cannot act for his principal, and at the same time act for the third party in the same transaction. Such action on his part is inconsistent with his whole duty toward his principal. He cannot, therefore, recover from both parties, and indeed he cannot recover from either party.[10]

Where the agent, however, acts merely as a middleman, or introduces the parties who afterwards, without the aid or suggestion or advice of the agent, consummate the transaction, he will be entitled to recover his compensation.[11]

83. **Obligations and duties of the agent to the principal.**—The relationship of principal and agent is a fiduciary one, and confidence and trust are reposed in the agent, which require upon his part the utmost good faith in the performance of his duties. He must be loyal to his trust and free from all secret

[9] Moore v. Appleton, 26 Ala. 633.

[10] Rice v. Wood, 113 Mass. 133.

[11] Knauss v. Gottfried Krueger Brewing Co., 142 N. Y. 70, LEADING ILLUSTRATIVE CASES.

and antagonistic interests which might prejudice the rights of his principal. The law will not permit the agent to place himself in a position where he might be tempted by his own private interests to disregard those of his principal. Every relation in which the duty of fidelity to each other is imposed upon the parties by the established rules of law is a relation of trust and confidence. The relation of principal and agent is an illustration. From the agreement which underlies this fiduciary relationship the law both implies a contract and imposes a duty that the agent shall be faithful to his trust and that he shall not use his position so as to defeat or hinder his principal in accomplishing any of the purposes for which the agency was created. A confidential manager of a large business who has acquired valuable information about certain trade secrets will be prevented by injunction from going with a rival concern and divulging to them the trade secrets of his former principal.[12]

84. **Same subject—Loyalty to his trust.**—From the foregoing it is apparent that when confidence is reposed in an agent by his principal the latter is justified in expecting the best efforts of his agent's skill, judgment, and discretion. The motive actuating the principal is confidence in the agent. He has a right to expect loyalty from the agent; but not only has he the right to expect this loyalty but the law justifies him in the expectation and severely condemns the agent for any action on his part wherein he endeavors to profit personally to the detriment of

[12] McCall Company v. Wright, 198 N. Y. 143.

his principal.[13] It is not a crime for an agent to be disloyal to his trust, but by his disloyalty he forfeits his right to compensation for services rendered, and in fact any right which he may have been otherwise entitled to under his contract.

85. **Same subject—Agent cannot deal with himself.**—An agent given authority to purchase property for his principal cannot purchase it from himself; and likewise where he is given authority to sell he cannot sell to himself. He is absolutely prohibited from putting himself in his principal's place to the latter's disadvantage and his own personal gain. An agent cannot avail himself of the benefit of any favorable settlement made by or through him on behalf of his principal. He cannot purchase in his own name a claim against his principal in order to enforce it against his principal. An agent is absolutely prohibited from taking any bonus or secret commission from the third party, in order to induce business relations between the principal and the third party. An agent is, in a sense, a trustee and he will be held to account to his principal for any gain or profit made by him in connection with his principal's property or business, and all profits made by him will be held to belong to the principal. In an important case recently decided, it has been held that where an agent, employed to sell goods for his principal, engages for his own profit in selling a similar line of goods, he will not be permitted to retain the profits of his unfaithful acts and the prin-

[13] The People v. Township Board, 11 Mich. 222, LEADING ILLUSTRATIVE CASES.

cipal will be entitled to recover them without proving damage to himself by loss of profits or otherwise.[14]

86. **Same subject—Obedience to instructions.**—To say that an agent must obey instructions is equivalent to saying that he must faithfully discharge the obligations cast upon him by the principal and honestly act within the scope of the authority conferred. Where an agent is entrusted with an undertaking which requires the exercise of his personal judgment and skill, he is obliged to proceed in the matter wholly with an eye towards the advantage and benefit of his principal. The agent's good faith is sometimes an element to be considered, but where positive and specific instructions are given him, his good faith does not warrant a departure therefrom. The agent renders himself liable to his principal for a disobedience of instructions. Not only may the principal hold him liable for any damages caused by failure to carry out the authority conferred but he is also justified in terminating the agency. By wilful disobedience of instructions the agent forfeits his right to compensation and indemnity. If he exceeds or violates or neglects the instructions given he is responsible for all losses which are the natural consequences of his acts.[15]

87. **Same subject—Ambiguous instructions.**—Where the instructions are ambiguous and they are open to more than one interpretation the agent will be justified in adopting such course as the facts reasonably warrant. In the case of a sudden emergency

[14] Reis & Co. v. Volck, 151 App. Div. 613 (N. Y.).
[15] Whitney v. Merchants Union Express Co., 104 Mass. 152.

where an agent has no opportunity to confer with the principal, a departure from his instructions may be justified when there is no fault or negligence imputable to the agent. The agent will not be justified in acting contrary to instructions simply because he disagrees with the principal as to their interpretation and the manner of carrying them out. Even though he is honest in his intentions, if he exceeds or violates clear instructions, he is responsible for all losses occasioned by his conduct.[16]

88. **Same subject—Effect of custom and usage.**—It is often necessary, in order that an agent may carry out his authority, to follow well-known customs and usages, even though the principal has not directly sanctioned such mode of procedure. These customs and usages, however, cannot supersede positive instructions.[17] In the latter event, the agent has been directly cautioned against such usages and customs. Nor can usage and custom be resorted to when they would be contrary to known rules of law. An agent authorized to sell for cash, cannot justify his act in accepting a check or a promissory note in payment, by showing or attempting to show this form of payment to be usual and customary. An agent authorized to accept checks or notes is not necessarily authorized to endorse them. No custom or usage in itself would justify this.

89. **Same subject—Duty to exercise care.**—It is apparent that an agent owes it to his principal not to be negligent in the performance of his duty. What

[16] Leroy v. Beard, 8 How. 451 (U. S.).
[17] Wanless v. McCandless, 38 Iowa 20.

is negligence in any case is usually a question of fact. It is the failure under the particular circumstances of the case to exercise such degree of care as an ordinarily prudent man would exercise. The agent impliedly warrants when he accepts the appointment that he possesses a competent degree of skill for the duty.

He does not warrant that he will make no mistakes or errors or that he will perform the duty in exactly the same manner as the principal might perform it, but he does undertake, in accepting the employment, to show a reasonable degree of care, skill and diligence in the particular circumstances in which he is authorized to act. There are many instances which might be pointed out as to the application of the rule of negligence, but the general rule will apply to all cases, namely: that "whoever bargains to render services for another undertakes for good faith and integrity, but he does not agree that he will commit no errors. For negligence, bad faith or dishonesty he will be liable to his employer; but if he is guilty of none of these, the master or employer must submit to such incidental losses as may occur in the course of the employment, because these are incident to all avocations, and no one, by any implication of law, ever undertakes to protect another against them."[18]

90. **Same subject—To account for money and property.**—The agent is obliged to keep accurate accounts of his transactions and he must stand ready to account to his principal when called upon, or as

[18] Page v. Wells, 37 Mich. 415.

the contract of employment requires, for all money and property which come into his possession belonging to the principal. It is a well-known rule in the law of agency and will bear repetition, that an agent cannot under any circumstances profit personally through the use of his principal's money and property. The agent will not be justified in mixing his own funds with his principal's. He never becomes entitled to his principal's money and holds it practically as a trustee. He must give notice to his principal of the collection of moneys, unless he has already received instructions as to the disposition thereof, or unless by a mode of dealing between the principal and the agent this rule has been modified.[19] He cannot under any circumstances dispute his principal's title to property which comes into his hands, and he is obliged to resort to all proper means and methods to assert and defend his principal's title to such property against third persons. If an agent has in the prosecution of an illegal enterprise for his principal received money or other property belonging to his principal, he is bound to turn it over to him and cannot shield himself from liability upon the ground of the illegality of the original transaction.[20]

91. **Same subject—Duty to give notice to principal.**—An agent must give his principal timely notice of all facts coming to his knowledge, which it is essential that the principal should know, in order to protect or safeguard his interests. He must

[19] Baldwin Bros. v. Potter, 46 Vt. 402.
[20] Kiewert v. Rindskopf, 46 Wis. 481.

acquaint his principal with every fact which may make it necessary for the principal to take measures for his security. He cannot neglect his agency because it has become troublesome. The honest performance of his duty requires that he protect his principal till he has resigned or given his principal an opportunity to substitute another agent. His failure to give notice to his principal in material matters involving the principal's rights and property will subject him to liability, and will amount to a forfeiture of compensation.[21]

[21] Devall v. Burbridge, 4 W. & S. 305 (Pa.).

CHAPTER VI.

LEGAL EFFECT OF THE RELATION AS BETWEEN PRINCIPAL AND THIRD PARTY.

92. **Disclosed principal.**—When an agent deals with third parties in the name of a particular principal the latter is called a disclosed principal, as distinguished from one whose name and identity are unknown at the time of the transaction, in which case the principal is said to be an undisclosed principal.

Once it is ascertained that the relationship of principal and agent exists, the question arises what is the responsibility as between the principal and the third party with whom the agent deals, with regard to the agent's contracts; in other words, what is the legal effect of the execution of the agency as between the principal and the third party. It is more ordinarily the case that an agent acts on behalf of a disclosed principal rather than on behalf of an undisclosed principal, for it is generally in the interest of the agent to make known the person on whose behalf he is acting.[22]

93. **Contracts made by the agent.**—The primary object of agency is to bring the principal into contractual relations with third parties. It is important, therefore, to inquire, what contracts of the agent are binding upon the principal. We have al-

[22] Byington v. Simpson, 134 Mass. 169, LEADING ILLUSTRATIVE CASES.

ready spoken of the agent's acting within the "scope of his authority" and we have ascertained that the meaning of this phrase is the proper and reasonable extent of the power expressly or impliedly conferred. When therefore the agent acts within the scope of his authority, whether the actual authority or the ostensible or apparent authority, his contracts with third parties are binding on the principal. When the agent acts beyond the scope of his actual authority, but within the scope of his apparent or ostensible authority, his contracts are also binding upon the principal unless the third party has notice that the agent exceeded the authority conferred.[23]

94. **Contracts actually authorized.**—There is little difficulty in placing responsibility upon the principal or upon the third party, as the case may be, for the contracts of the agent when such contracts have been actually authorized. The principal will of course be bound in the same manner as if he personally made the contract. The third party will be likewise bound because he dealt with the agent under his actual and defined authority.

95. **Ostensible authority of the agent.**—The doctrine of ostensible authority has been defined as follows: "Where a principal has by his voluntary act placed an agent in such a situation that a person of ordinary prudence conversant with business usages and the nature of the particular business is justified in presuming that such agent has authority to perform on behalf of his principal a particular act, such particular act having been performed, the

[23] Huntley v. Mathias, 90 N. C. 101; Pickert v. Marston, 68 Wis. 465.

principal is estopped as against such innocent third person from denying the agent's authority to perform it."[24]

The ostensible or apparent authority may therefore arise from the known customs and usages of a business or of a locality or from the manner in which the principal has held out the agent. As distinguished from actual authority, ostensible authority springs from inference, and when the inference is reasonable under the particular circumstances and the parties act in good faith, the agent's contracts are binding.

96. **Contracts unauthorized.**—The third party is bound to ascertain the extent of the agent's authority. If the agent has neither actual nor apparent authority there is, as a matter of fact, no principal to be bound; and the principal upon whose behalf the agent attempts to act is under no circumstances held responsible. In the first place the alleged principal never authorized the contract and secondly he did not estop himself from denying the agency by holding out the agent as his for any purpose. It is elementary therefore to say that the principal is not responsible for contracts which he has neither directly nor indirectly authorized; just as it is equally elementary to say that he is responsible for contracts which he has duly and properly authorized his agent to make.

97. **Contracts of agent on behalf of undisclosed principal—The general rule.**—It has already been

[24] Johnston v. Milwaukee & W. Investment Co., 46 Neb. 480; Huntington v. Knox, 7 Cush. 371 (Mass.), LEADING ILLUSTRATIVE CASES.

pointed out that when an agent makes a contract in his own name and ostensibly for his own benefit but is in reality acting for the benefit of a principal, the latter is said to be an undisclosed principal. An act done by an agent in his own name without disclosing his principal renders the agent personally liable, but his acts having been in fact done for a principal, the latter, when discovered, may, at the option of the party with whom the agent has dealt, be held liable. This is true in all simple contracts made on the principal's behalf by the agent.[25] The law, as it were, operates upon the acts and intention of the parties and establishes a privity between the principal and the third party, and, further, implies the promise and obligation on which the action is founded. It accords a remedy to the party who is chiefly interested.

So when the agent acts for an undisclosed principal he is acting for the benefit and advantage of that principal, and the law, in a roundabout way perhaps, but nevertheless surely, places responsibility on the principal to the advantage of the third party, or holds the latter to the advantage of the principal, as the circumstances require.

98. **Suits against an undisclosed principal.**—A suit against an undisclosed principal rests upon the ground that the principal has had the benefit of the contract and ought to bear the burden. It is in a sense a quasi-contractual obligation created by law. Where a party deals with a principal through an agent, and the principal has the benefit of the deal-

[25] Kayton v. Barnett, 116 N. Y. 625, LEADING ILLUSTRATIVE CASES.

ing, it is said that the minds of the parties have met through the agent's mind, and that, if the principal through his own or his agent's deception acquires certain rights and property, he cannot resist liability. It is to be observed that the agent does not in all these cases relieve himself of responsibility. In fact, it is a general rule that the third party who deals with an agent personally, even though the latter acts for an undisclosed principal, may hold the agent personally responsible.[26] The third party usually has his election to hold either principal or agent responsible, but it is plain that he cannot hold both of them.

In suits against an undisclosed principal certain defenses are open to the latter, the first of which may be stated to be the state of accounts between the principal and the agent. When one sells goods to another, supposing him to be a principal, but afterwards learns that he is an agent, he may nevertheless hold the principal, subject to the qualification that the state of the account between the principal and the agent be not altered to the prejudice of the principal. The principal is said to be discharged where he has in good faith paid the agent or made such change in the state of the account between the agent and himself that he would suffer loss if he should be compelled to pay the seller. Delay upon the part of the third person may often prejudice the principal and work an estoppel. The principal is discharged from liability to the third person where the latter has by his conduct led the principal to believe

[26] Gordon Malting Co. v. Bartels Brewing Co., 206 N. Y. 528.

that there has been a settlement between the third person and the agent.[27]

Another defense which may be urged by the undisclosed principal is that the third party has unequivocally elected to hold the agent. The third party's election is a question of fact. Where the third party learns who the principal is but nevertheless proceeds against the agent, he is precluded from afterward bringing action against the principal.

A further defense open to the undisclosed principal is the fact that the contract between the agent and the third party was under seal and, under such circumstances, the common law rule would apply that only the parties named in a sealed instrument can sue or be sued upon it.[28]

Where the contract is a negotiable instrument, only the party whose name appears on the paper can be sued upon it. If there is ambiguity upon the face of the paper as to whether the principal or the agent is intended to be bound, evidence is admissible to show the real situation.

99. **Suits by an undisclosed principal.**—The undisclosed principal may sue the third party even although the latter never intended to undertake an obligation in favor of the principal. Where, however, by the express or implied terms of the contract there is a plain indication that the third party intended to contract only with the agent as the ostensible principal, the real principal cannot maintain an action upon the contract. Furthermore, as indi-

[27] Heald v. Kenworthy, 10 Ex. 739 (Eng.); Fradley v. Hyland, 37 Fed. Rep. 49 (U. S.); Knapp v. Simon, 96 N. Y. 284.

[28] Briggs v. Partridge, 64 N. Y. 357, LEADING ILLUSTRATIVE CASES.

cated above, where the contract made by the agent in his own name with the third party is under seal the principal cannot become a party thereto or maintain an action thereon. And where the contract is a negotiable instrument it is the rule that only the parties thereto may sue or be sued thereon.

A principal may maintain an action upon a contract not under seal made by his agent with a third person, although the agency was not disclosed when the contract was made. If the agent has authority to make a written contract not under seal and makes it in his own name, the principal, whether known or unknown, is liable and he in turn is entitled to the benefit of the contract and may sue thereon.

Thus, where a creditor took a chattel mortgage on goods of his debtor in reliance upon a statement as to their value made by a professional appraiser, which valuation was grossly excessive, he could maintain an action against the appraiser to recover the loss caused by such negligence although the appraiser was employed by the plaintiff's attorneys who did not disclose their principal.

It seems, that although an undisclosed principal may as a general rule enforce a contract made by his agent in his own name, there is an exception where personal trust or confidence is reposed by the third party in the agent who contracted in his own name.[29]

The state of accounts between the agent and the third party at the time the principal seeks to assert his rights against the third party is also a matter of

[29] See the recent case of Navarre Hotel and Importation Company v. American Appraisal Company, 156 App. Div. 795 (N. Y.).

defense. The principal cannot assert his rights without leaving to the third party the same rights as if the agent had been in fact the principal. Where the agent sells goods in his own name, having possession of the goods, the right of set-off which might be asserted against the agent may be asserted against the undisclosed principal. Where the agent has not possession of the goods the right of set-off cannot in general be asserted by the third party. The doctrine of the state of accounts between the third party and the agent is practically the doctrine of estoppel. When the principal by his conduct leads third parties to believe that the agent is the principal, the real principal is estopped from asserting against the third party any claims to the latter's prejudice; if the principal invests his agent with the indicia of ownership of property he is estopped, as against those who deal with the agent as owner, to set up his own claim or title. And in general, where the principal, by representing the agent to be the principal, has induced innocent third parties to change their legal relations in such manner as to make it unequitable for the principal to claim the right of an undisclosed principal, he will be estopped from maintaining an action in his own name.

100. **Parol evidence rule.**—It is a well settled rule that parol evidence is admissible to show that a written contract, made in the name of an agent, was made on behalf of an undisclosed principal. "Whatever the original merits of the rule that a party not mentioned in a simple contract in writing may be charged as a principal upon oral evidence, even

where the writing gives no indication of an intent to bind any other person than the signer, we cannot re-open it, for it is as well settled as any part of the law of agency."[30]

101. **Same subject.**—The rule that parol evidence is admissible to charge the real principal under a contract wherein he is not named, does not apply of course where the instrument is signed and sealed by the agent or where it is a negotiable instrument. While parol evidence is admissible under simple contracts to charge the real principal it is not admissible to discharge the agent, for it is said that to permit this would be to allow parol evidence to contradict a written instrument and this is opposed to a sound rule of evidence. Furthermore, parol evidence is not admissible to contradict the express terms of a written contract. The concise statement of the rule would be to say that parol evidence is admissible under a simple contract to charge the unnamed principal but not to discharge the actual signer. The parol evidence rule is equally operative in favor of the principal not named in the contract to show that he is not the real principal; and where the third party looks to hold the actual signer parol evidence is not admissible to release him from the obligation which he has voluntarily assumed. It is a rule, therefore, which operates for the benefit of the principal and the third party when they seek to take advantage of it, but is not operative to release the agent who has dealt in his individual capacity.[31]

[30] Byington v. Simpson, 134 Mass. 169, LEADING ILLUSTRATIVE CASES.
[31] Gordon Malting Co. v. Bartels Brewing Co., 206 N. Y. 528.

102. **When notice to agent is notice to principal.** —It is well established in the law of agency that notice received by an agent in the course of his employment, and in connection with the exercise of his authority, is notice to the principal.[32] Whether or not the agent communicates to his principal all the material facts of which he has acquired knowledge in the discharge of the agency, the same are, nevertheless, binding upon the principal. The principal entrusts his agent with the performance of the duty and the third party has a right to assume that the agent will faithfully discharge his obligation and that the agent will report to his principal any facts and circumstances connected with the accomplishment of the agency.

Another statement of the rule in question is to say that if notice of a particular fact comes to the agent while he is concerned for the principal and in the course of the very transaction, or so soon before it that the agent must be presumed to recollect it, it is notice to the principal. Where an agency is in its nature continuous and made up of a long series of transactions of the same general character, the knowledge acquired by the agent in one or more of the transactions is to be charged as knowledge of the principal.[33]

Where the agent acquires notice outside of the transaction the principal is only chargeable upon clear proof that the knowledge which the agent had and which he might have obtained at another time

[32] Constant v. University of Rochester, 111 N. Y. 604.
[33] Holden v. N. Y. & Erie Bank, 72 N. Y. 286.

and in another transaction, was present to his mind at the very time of the transaction in question.

103. **Notice to sub-agent.**—The question of the liability of the principal for knowledge or notice brought home to the sub-agent depends very largely upon whether or not the sub-agent was appointed with due authority. If the agent had power to appoint the sub-agent, then notice to the sub-agent is usually held binding upon the principal. Where an agent is authorized to make a collection and he turns the matter over to a sub-agent, it is a general rule that the principal would not be chargeable with notice to the sub-agent, for the reason that under the circumstances there was no express or implied authority in the agent to employ a sub-agent. If, however, the business transaction confided to the agent reasonably contemplates the appointment of a sub-agent, it is said that notice to the sub-agent will then be binding upon the principal because of the implied authority to hire or employ a sub-agent. Furthermore, the usages and customs of trade will sometimes govern in the solution of the question.[34]

104. **Liability of principal to third persons for the agent's tort.**—It is well known that a master is responsible for the torts of his servant, when the latter commits the tort in the performance of his duty. The same rule also applies in the relationship of principal and agent. When the agent in the performance of his duty and within the scope of his authority commits a tort he renders his principal

[34] Hoover v. Wise, 91 U. S. 308; Bates v. American Mortgage Co., 37 S. C. 88.

liable therefor.[35] The agent's torts usually arise out of misrepresentations or frauds, and while it may be frequently the fact that the principal did not authorize his agent to make representations or commit frauds, nevertheless the test of the principal's responsibility is whether or not the agent acted within the ostensible authority conferred, in order to induce the third party to act.[36] It is sometimes said that the liability of the principal for his agent's torts is founded upon the doctrine of estoppel. An agent may have real or apparent authority to make representations, but the same cannot be said about his committing torts; and the principal is estopped from denying his responsibility for his agent's torts when committed within the exercise of his real or ostensible authority.

[35] State v. Smith, 78 Me. 260.

[36] Noblesville & E. Gravel Road Co. v. Gause, 76 Ind. 142; Passenger R. R. Co. v. Young, 21 Ohio St. 518; Higgins v. Watervliet, etc., Co., 46 N. Y. 23.

CHAPTER VII.

LEGAL EFFECT OF THE RELATION AS BETWEEN AGENT AND THIRD PARTY.

105. **The duties and liabilities of the agent to third persons.**—The manner in which the agent acts toward third parties, and third parties toward the agent, gives rise to certain rights and obligations on the one side and on the other, which form an essential part of the law of agency. Neither the third party nor the agent seek to create obligations as between themselves (for the agent is merely a representative), but through neglect, fraud, or ignorance these obligations may be created. These mutual rights or obligations may arise out of contract or they may arise out of tort. It is the general rule that third persons cannot recover damages from an agent for the neglect or non-performance of a duty which the agent owes only to the principal.[37] How, then, is the agent liable to third persons? His liability to third persons arises either from the fact that he has so contracted as to bind himself or because he has failed to exercise a proper regard for the rights and privileges of others while in the prosecution of his agency. In the latter case he is held responsible, notwithstanding the act is one authorized by the principal, since the law, in protecting the rights of the public, demands that he

[37] Henshaw v. Noble, 7 Ohio St. 226.

who does the act shall be equally responsible with him who authorizes it. In the former case the agent's liability arises from contract, in the latter from his torts or wrongful acts.[38]

106. **Same subject—In contract.**—It may be pointed out first of all that when the agent acts within the scope of his authority and discloses his principal, the latter is alone bound by the agent's contract. When, however, the agent, knowingly or mistakenly, acts outside the scope of his authority, and represents that he has the requisite authority, he is liable to the third party for the damages sustained by the latter in reliance on the agent's representations.[39] In the first instance above referred to the contract was authorized, and in the second instance it was unauthorized.

In the case of the unauthorized contract it is true the agent may not be held on the contract, for there was in fact no contract.[40] He may be held in damages for the breach of his warranty of authority, for he impliedly warrants his authority when he makes a contract for his principal. But when the agent specifically states that he does not warrant his authority, or where he acts in good faith and the third party has knowledge of the facts upon which the agent's belief is founded, there is no liability on the part of the agent. Neither would an action lie against the agent if the contract which he made

[38] See generally, Gordon Malting Co. v. Bartels Brewing Co., 206 N. Y. 528.

[39] Kroeger v. Pitcairn, 101 Pa. St. 311, LEADING ILLUSTRATIVE CASES.

[40] Ballou v. Talbot, 16 Mass. 461; McCurdy v. Rogers, 21 Wis. 197; Hall v. Crandall, 20 Cal. 568.

was invalid and he was unable to enforce it against the principal.

When the agent makes a contract in his own name and on his own behalf he may, of course, be sued upon the contract as his own.[41] But when he makes an unauthorized contract on behalf of his principal the suit against him is on the breach of his warranty of authority, and the damages that may be recovered are those which might have been recovered against the principal in case the contract had been authorized and the principal had refused to perform it. In the event that the contract is found to be unenforcible against the principal by reason of some defect other than the want of authority in the agent, no damages based upon the breach of his warranty of authority can be recovered against the agent.

The warranty of authority means not only that the agent has the requisite authority to make the contract, but, further, that his principal was competent to give such authority when it was given and has not since, to the knowledge of the agent, become incompetent.[42]

An agent may so deal as to bind himself personally even though he discloses who his principal is. It resolves itself into a question of the intention and understanding of the parties. Where, for example, a seller knows the principal but debits the agent, he is presumed to have consented to look to the agent; and where the principal is known, but

[41] Meyer v. Redmond, 141 App. Div. 123 (N. Y.), LEADING ILLUSTRATIVE CASES.

[42] Drew v. Nunn, L. R. 4 Q. B. D. 661 (Eng.); Hoppe v. Saylor, 53 Mo. App. 4.

the third party accepts the personal obligation of the agent, it is likewise presumed that credit is given to the agent and not to the principal. If the ostensible agent is really the principal and is, in fact, acting on his own behalf, he is, of course, liable upon the contract. Further, when the agent makes a contract under seal in his own name, he alone is bound thereby, for under the common law it is held that only the parties to a sealed contract can be charged thereunder.[43]

With regard to negotiable instruments the general rule prevails that only the person in whose name the instrument is executed is liable upon it and that parol evidence is inadmissible to prove that one who executes a negotiable instrument in his own name did so in behalf of an undisclosed principal, or of a principal disclosed but unnamed in the instrument.

A general rule running through the doctrine of undisclosed principal in the law of agency is that when the agent contracts in his own name for an undisclosed principal both the agent and the principal are liable, and the third party may elect which he will hold. Once the third party has elected to hold the principal, the agent is released and vice versa. A principal is not said to be undisclosed, however, simply because he is not named; if the third party knows the agent is acting for a principal and there is no specific contract binding the agent personally, the sole remedy will be against the principal.

[43] Briggs v. Partridge, 64 N. Y. 357, LEADING ILLUSTRATIVE CASES.

It may then be summarily stated, first, that where an agent contracts in his own name and on his own behalf he is personally liable; second, where an agent acts for a principal but without due authorization he is liable in damages on contract for a breach of his implied warranty of authority (or, as is pointed out in the next section, in tort for his wilful deceit); third, where an agent makes an authorized contract for an undisclosed principal the principal and the agent are liable on the contract and under some circumstances the agent by his manner of acting may make himself solely liable, and in general the third party has his right of election to proceed against either the principal or the agent.

107. **Same subject—In tort.**—If the agent wilfully misrepresents his authority he is liable to the injured party in an action of deceit. This action in tort is based upon his wilful or reckless conduct. It is distinguished from the action against the agent on contract for the breach of his warranty of authority. To maintain the deceit action the third party must be actually deceived and all the other elements of the tort action in deceit must be present. An agent is not liable to third persons for the neglect or nonfeasance of those duties which he owes only to his principal, as they are owing to the principal and none but he can complain. Under this rule it is held that an agent is not liable to others who are damaged by his neglect to keep his principal's building in repair, or to keep open a drain of the principal. But for misfeasance, by which is meant wrongdoing or active negligence in

the performance of his duties, the agent is liable to those who are injured thereby. "But an agent, like any other person, is bound in the performance of his duty to his principal to recognize and respect the rights and privileges of others, and if he fails to do so, either negligently or intentionally, and thereby causes injury to a stranger, he is liable to the stranger for the damages sustained, and the fact that the injury occurred while in the performance of his agency will constitute no defense. In certain of such cases the principal will be liable also, but that fact does not relieve the agent."[44]

"No man increases or diminishes his obligations to strangers by becoming an agent. If, in the course of his agency, he comes in contact with the person or property of a stranger, he is liable for any injury he may do to either, by his negligence in respect to duties imposed by law upon him in common with all other men."[45]

108. **Same subject—Public agents.**—The rules fixing the liability of agents to third persons, which have just been presented, are applicable to private agents, as distinguished from public agents or officers. Public officers or agents owe their duty primarily to the public, and it is the general rule that they do not become liable to individuals for neglect or violation of their public duties. But in case they owe a duty to a particular individual which duty is ministerial in nature, and does not involve judgment or discretion in its exercise, they do be-

[44] Mechem, Agency, § 571.

[45] Delaney v. Rochereau & Co., 34 La. Ann. 1123, LEADING ILLUSTRATIVE CASES.

come liable to the individual for any damage or injury sustained by him.[46]

109. **Duties and liabilities of third persons to the agent.**—As a rule the contracts made by an agent, as such, on behalf of his principal and in which he has no beneficial interest cannot be sued upon by the agent. The principal alone can sue upon them. But where the contract is made with the agent personally, whether intentionally or as a result of defective execution of the authority, whereby the agent binds himself instead of his principal, it is the agent's own contract and he may sue upon it. In such contracts the agent has bound himself to the other party, and in order that the contracts be valid the other party must be held bound to the agent. "An agent may sue in his own name: First, when the contract is in writing and is expressly made with him, although he may have been known to act as agent. Secondly, when the agent is the only known or ostensible principal and is, therefore, in contemplation of law, the real contracting party. Thirdly, when, by the usage of trade, he is authorized to act as owner or as a principal contracting party notwithstanding his well-known position as agent only. But this right of an agent to bring an action in certain cases in his own name is subordinate to the rights of the principal who may, unless in particular cases where the agent has a lien or some other vested right, bring suit himself and thus suspend or extinguish the right of the agent."[47]

[46] Moss v. Cummins, 44 Mich. 359.
[47] Rowe v. Rand, 111 Ind. 206.

Where the agent has a beneficial interest in the execution of the contract, as for advances, commission, and the like, or a lien upon, or a special property in, the subject matter of the contract, he may also sue upon it in his own name.

Although the contract is in the name of the agent and the principal undisclosed, yet the principal on whose behalf it is made may sue upon it and thus preclude the agent, unless the contract made with the agent is under seal, or he has a beneficial interest, lien, or other vested right in the matter.[48]

Whether an agent, who has acted as such, in dealing with a third person can show himself to be the real principal depends upon whether the contract is executed or executory and whether in making it he has or has not named the principal. Thus, if he contracted for a named principal and the contract is executory, or yet to be performed, he cannot, without the consent of the other party, place himself in the position of the principal for whose credit or skill the party contracted. But if the contract has been executed by such agent with the express or implied consent of the other party, he may compel performance from the other party to himself; otherwise, however, if the agent has performed as principal without the knowledge or consent of the other party. When the contract by the agent is made for an unnamed principal, whether it is executed or executory, the agent may show himself to be the real principal, as the other party cannot be said to have relied upon the credit or ability of

[48] Schaefer v. Henkel, 75 N. Y. 378.

a principal whom he does not know, and the agent will answer for such unknown principal as well as another.

In all cases where the agent sues in his own name on contracts made in behalf of the principal, the defendant may avail himself of all defenses which would be good at law and in equity: 1. As against the agent who is plaintiff on the record, or, 2. As against the principal for whose use the action is brought, if such a principal exists. If the action of the agent is not superseded by that of the principal, he is entitled to recover the same measure of damage as the principal himself could recover.

For the wrongful or tortious acts of third persons which affect him personally in the course of his employment, the agent may sue in his own name, though in such cases the principal is entitled to an action for the loss of service or for damage.

Ordinarily the agent's possession of his principal's goods alone does not give him the right to sue in his own name one who would disturb his possession. Otherwise, however, if the agent has a claim on the goods or a property right in them. As against a trespasser the agent with a special interest in his principal's goods may recover the full value of the goods taken, but as against his principal, or those claiming under him, he can only recover the amount of his interest.[49]

[49] Mechem, Agency, §§ 764, 765, citing Faulkner v. Brown, 13 Wend. 63 (N. Y.); Beyer & Co. v. Bush & Son, 50 Ala. 19; Little v. Fossett, 34 Me. 545; Burk v. Webb, 32 Mich. 173.

CHAPTER VIII.

SPECIAL CLASSES OF AGENTS.

110. **Purpose of chapter.**—Certain classes of agents are of such general importance as to demand separate attention at the hands of text-writers; these are, Attorneys-at-Law, Auctioneers, Brokers, and Factors. In the present chapter the special rules applicable to these particular agencies will be discussed.

111. **Attorneys-at-law—Nature of the relation of attorney and client.**—The relation which arises from the employment of an attorney-at-law to conduct a case or transact business for one is that of principal and agent, and the general rules applicable to agency apply to the parties to the contract. The employment of the attorney, or his authority, may be formal, but is more frequently informal, and may arise from the words or conduct of the client, or be the result of a subsequent ratification of unauthorized acts. The authority of a duly admitted attorney who appears in a cause is presumed in the first instance, but the presumption is not conclusive and may be questioned by the client or the opposite party. The presumption has its origin in the fact that the attorney is an officer of the court, and as such is considered to be acting in accordance with his duty.[50] Hence, in an action on a foreign or

[50] Schlitz v. Meyer, 61 Wis. 418.

domestic judgment, the defendant may show that he was not served with process and the appearance by attorney was unauthorized.[51]

112. **Scope of the attorney's authority.**—An attorney-at-law is defined to be "an officer of a court of justice who is qualified to conduct the cause of a litigant therein."[52] He is an officer of the court and is quite generally required to have certain qualifications as a prerequisite to practicing his profession. Thus, in most states he is required by statute to pass an examination upon the various branches of law and show himself qualified by attaining a certain average grade therein. Other qualifications are full age, good moral character, citizenship in the state, and, in some instances, it is held that only male persons can qualify as attorneys.[53]

It has been recently held in an important case in the state of New York[54] that corporations cannot practice law, and the language of Mr. Justice Vann, who wrote the unanimous opinion of the court, is so significant that the following quotation from the opinion will not be out of place:

"The relation of attorney and client is that of master and servant in a limited and dignified sense and it involves the highest trust and confidence. It cannot be delegated without consent and it cannot

[51] Gilman v. Gilman, 126 Mass. 26; Mastin v. Gray, 19 Kan. 458; Pennywit v. Foote, 27 Ohio St. 600; Reynolds v. Fleming, 30 Kan. 106.

[52] Mechem, Agency, § 802, citing Weeks, Attorneys, § 28.

[53] Women are not eligible in Massachusetts. See Robinson's Case, 131 Mass. 376. But in a majority of the states women are eligible to become attorneys-at-law. Matter of Hall, 50 Conn. 131; Matter of Goodell, 48 Wis. 693.

[54] Matter of Co-Operative Law Company, 198 N. Y. 479.

exist between an attorney employed by a corporation to practice law for it and a client of the corporation, for he would be subject to the directions of the corporation and not to the directions of the client. There would be neither contract nor privity between him and the client and he would not owe even the duty of counsel to the actual litigant. The corporation would control the litigation, the money earned would belong to the corporation and the attorney would be responsible to the corporation only. His master would not be the client but the corporation, conducted, it may be, wholly by laymen, organized simply to make money and not to aid in the administration of justice, which is the highest function of an attorney and counsellor-at-law. The corporation might not have a lawyer among its stockholders, directors, or officers. Its members might be without character, learning, or standing. There would be no remedy by attachment or disbarment to protect the public from imposition or fraud, no stimulus to good conduct from the traditions of an ancient and honorable profession and no guide except the sordid purpose to earn money for stockholders. The bar, which is an institution of the highest usefulness and standing, would be degraded if even its humblest members became subject to the orders of a money-making corporation engaged not in conducting litigation for itself, but in the business of conducting litigation for others. The degradation of the bar is an injury to the state.

"A corporation can neither practice law nor hire lawyers to carry on the business of practicing law for it any more than it can practice medicine or dentistry by hiring doctors or dentists to act for it. (People v. Woodbury Dermatological Institute, 192 N. Y. 454; Hannon v. Siegel-Cooper Co., 167 N. Y. 244, 246.)"

Being officers of court and amenable thereto, attorneys-at-law, in relation to the conduct and management of their client's suits, have a wide range of implied authority, and so long as their acts are in good faith, and are not fraudulent or collusive, they bind the client, though they may be prejudicial to his interests.[55]

The express authority given an attorney may be as broad or limited as the client desires, but a general authority to manage a cause for the client as his attorney of record may imply many incidental powers, and these have been classified by Professor Mechem in his valuable work as follows:

"To make such affidavits as are required in the progress of the cause when the facts are within his knowledge. To waive a verification. To serve, and accept service of, all necessary and proper papers, notices, etc., during the progress of the cause. To waive formal notice of proceedings in the cause. To waive or extend the time fixed for any motion or proceeding. To consent to a reference of the cause. To submit the cause to arbitrators. To dismiss or discontinue the action. To consent to a nonsuit. To appeal the case. To admit facts for the purpose of trial, either on the trial or before. To stipulate as to the issues to be tried. To waive informalities and technicalities. To release an attachment lien before judgment. To stipulate that judgment in the cause be the same as in another cause then pending involving the same questions. To get necessary briefs printed at client's expense. To bring a new action after a nonsuit. To agree that upon judgment being entered for his client he will suspend

[55] Beck v. Bellamy, 93 N. C. 129; Moulton v. Bowker, 114 Mass. 36.

the issue of execution. To remit damages after a verdict."[56]

The same author has also summarized the authorities as to what an attorney-at-law, employed to manage a suit, has not implied power to do; thus, such an attorney has no implied power:

"To admit or accept service of original process, by which the court acquires original jurisdiction for the first time of the person of his client. To confess or consent to judgment against his client. To enter a retraxit when it is a final bar. To stipulate that the dismissal of an action shall bar an action for malicious prosecution. To compromise the claim of his client. To release his client's cause of action. To stipulate not to appeal or move for a new trial. To release the property of the defendant from the lien of a judgment, or from the levy of an execution. To release his client's security without payment. To discharge or release a surety or endorser. To discharge a defendant in custody on a ca. sa., without the plaintiff's consent or without satisfaction. To agree to suspend proceedings on a judgment. To release a garnishee from the attachment of money or property in his hands. To release the interest of parties so as to make them competent as witnesses. To give an extension of time on the demand. To assign or transfer the demand or suit to a third person. To consent to stay the execution if lien will be lost. To waive the right to an inquisition. To give up the demand and take other security. To employ counsel at client's expense. To stipulate that case shall not be tried during certain periods. To undertake journeys on client's behalf and at his expense."[57]

[56] Mechem, Agency, § 812.

[57] Mechem, Agency, § 813.

An attorney-at-law may employ subordinates as clerks, stenographers, etc., to assist in the employment, but has no authority to delegate his duty to others, as the relation is pre-eminently one of trust and confidence.

Whether an attorney has implied authority to execute bonds in the name of his client depends upon the circumstances. If such bonds are required to be under seal, he must have similar authority. But where a seal is not required and the bond is necessary to protect the client's interests and fulfill the purpose of the employment, the attorney may sign a bond in the name of the principal, but he is under no obligation to do so.[58]

The attorney has authority to receive payment of a claim given him to collect, but he cannot receive part in satisfaction of the whole, or grant extensions or indulgences. Payment to the attorney will discharge the debtor, but if the payment is made on account of a written security the debtor must see that the attorney holds the security.[59] The authority extends to receiving or enforcing payment after judgment, and payment to the attorney of record will satisfy judgment. But the payment, to release the judgment, must be in money and for the full amount.[60]

113. **The duties and liabilities of attorneys.**—The relation between the attorney and his client is one of trust and confidence, and frequently involves affairs of the greatest importance and delicacy, so

[58] Mechem, Agency, § 816.
[59] Smith v. Kidd, 68 N. Y. 130.
[60] Herriman v. Shomon, 24 Kan. 387.

that the rules applicable to persons standing in fiduciary relations apply with added force to this relation.

Towards his client the attorney must observe the duty to keep from accepting or representing adverse interests calculated to affect his loyalty to his principal. So it is his duty, and one which he warrants that he will perform by accepting the employment —to exercise reasonable care and skill in the management of the trust confided to him. He is not held to the highest degree of skill or ability, and is not to be presumed infallible, or bound to know all the law. And if he possesses the average degree of skill and learning in his profession current in that part of the country in which he practices, and exercises such learning and skill with reasonable care and diligence, he will not be liable for mistakes made in the course of the employment.[61]

For negligence in respect to his duty to exercise reasonable skill and care he is liable in damages to his client. And for negligence or palpable ignorance in regard to the well-known and well-settled principles of law which affect the client's rights, as in respect to the bringing of a suit, the conduct of the trial, examination of titles, preparation of contracts, and the like, the attorney becomes liable to his client for the injury done, the measure of damage being the actual loss sustained as the natural, direct, and proximate result of his negligence or ignorance.[62]

[61] Mechem, Agency, §§ 824, 825.

[62] Pennington's Ex'rs v. Yell, 11 Ark. 212; Stevens v. Walker, 55 Ill. 151.

Towards third persons the attorney cannot become liable for the neglect of any duty he owes to his client. But he may not collude with his client to perpetrate a fraud upon a third person, and for such wrongdoing he is liable. He is held liable as other agents where he contracts in his own name.[63] Thus, he is held liable for the fees of court officers for serving and filing writs and papers in an action. For his torts or wrongs towards third persons in his individual capacity he is liable, but for acts done in pursuance of his profession at the instance of the client, in good faith and without malice, he is not personally responsible, and this is true though the client has acted with malice or without probable cause.[64] The attorney is liable if of his own malice, though apparently acting for the client, he begins or carries on a malicious prosecution. So, if the attorney, knowing that his client was acting maliciously and without probable cause, assists him in the issuing and service of process, he will be liable personally as well as the client.

114. **Liability of the client to the attorney.**—The attorney, as other agents, is entitled to reimbursement for costs, charges, and expenses which he has incurred in his client's behalf, and to indemnification against the results of acts done for the client within the scope of his authority. He is entitled to compensation and may sue for same.[65] The compensation may be agreed upon and then the special con-

[63] Savings Bank v. Ward, 100 U. S. 195.
[64] Burnap v. March, 13 Ill. 535; Peck v. Chouteau, 91 Mo. 138.
[65] Stanton v. Embry, 93 U. S. 548.

tract governs; but in the absence of express contract the attorney is entitled to compensation measured according to the reasonable value of the services performed. And the question of what is a reasonable value is determined from a consideration of "the nature of the controversy and the questions involved; the amount at issue; the skill and labor required; the responsibility imposed; the standing, experience, learning, reputation, tact, assiduity, and integrity of the attorney; and the success achieved."[66]

It is the right of the client to discharge the attorney at any time, and this though there has been a general retainer for which the attorney is bound to conduct the case from its beginning to its termination.[67] The client may, by a special agreement, bind himself to employ and pay the attorney for a definite period or for a certain case. In the absence of such agreement the dismissal of the attorney is no grounds for damages from the client. But it is held that the attorney cannot be discharged without cause until he is paid his fees and charges.[68]

115. **The attorney's lien.**—The compensation of an attorney is a matter of contract between himself and his client. The law protects the attorney by giving him a lien upon his client's papers and property in his possession. The lien is of two kinds, general and special. The general lien is the right to retain the papers and property of the client entrusted to him until the payment of his bill. The

[66] Mechem, Agency, § 849.
[67] Tenney v. Berger, 93 N. Y. 524.
[68] Ogden v. Devlin, 45 N. Y. Supr. 631.

special lien attaches to the judgment or the money recovered in an action and, generally by statute, to the client's cause of action. Under the general lien the attorney may refuse to surrender papers or property of his client without full payment for services rendered. Under the special lien the attorney has a claim upon the moneys in his possession obtained through his efforts for his client. The general lien is sometimes referred to as the passive or retaining lien, and the special lien is sometimes referred to as the active lien.

The relationship of attorney and client must, of course, exist in order that the attorney may avail himself of the benefits of the lien, and the attorney may elect to waive his lien voluntarily or there may be circumstances under which, by his conduct and action, his right to a lien may be forfeited.[69]

116. **Privileged communications.**—One of the well-settled rules of law is that which makes confidential, and prevents from being disclosed, secret communications which are made necessary in certain cases between a person and his adviser. The law, seeking to protect the confidence which the client reposes in the attorney, does not compel the latter to disclose these matters, and further prevents him from voluntarily disclosing them without his client's permission. This subject of privileged communications pertains rather to the law of evidence than to the subject now in hand, and the student is referred to the subject of Evidence treated in Volume X of Modern American Law.

[69] For further treatment of this point see subject, LIENS AND PLEDGES.

117. **Auctioneers.**—As a rule, in the absence of statutes prescribing requirements, any person competent to act as an agent may be employed as an auctioneer. Regulations in some cases are prescribed by statute, and they may also be subject to local municipal ordinances. The auctioneer is the agent of the person employing him to sell, up to the moment he accepts a bid and declares the sale consummated. He then becomes the agent of the purchaser to complete the transfer and sale of the property and may bind him by making and signing memorandums of the transaction. In making the terms he acts for both parties with their implied assent. But his authority to bind the purchaser is limited and must be exercised at the time of accepting the bid and at the place of sale.[70] His authority may be by parol or in writing, and need not be in writing even to sell realty, unless expressly required by the statutes. The authority to sell goods at auction may be implied, but does not arise from a mere authority to sell. The auctioneer has implied power to arrange the conditions and terms of sale upon such reasonable and ordinary rules as usually govern, but these may be prescribed by the owner and then must be followed, and the buyer who has notice of them cannot acquire title contrary to their provisions.[71] Further, the auctioneer has implied power to accept the highest bid and declare the sale consummated; to receive payment, in cash at the time of sale, of the purchase price, unless known to

[70] Horton v. McCarty, 53 Me. 394.
[71] Farr v. John, 23 Iowa 286.

be restricted in this respect; and in the case of personal property to sue for the price or the recovery of the goods, if the terms of the sale are not lived up to by the purchaser.[72]

The auctioneer has no authority to delegate his employment; to sell on credit; to revoke the sale when completed; to sell at private sale; to bid himself, directly or indirectly, or to warrant quality, unless such is the usual custom.

118. **Duties and liabilities of auctioneers.**—As other agents, the auctioneer must use such skill and diligence as the employment which he holds himself out as competent to conduct requires, but he will not be responsible for mistakes or errors of judgment in the absence of apparent negligence. He should obey and follow the reasonable instructions of the principal, look after the safety of goods entrusted to him, account for proceeds, attend to his duties in person, and disclose the fact of his agency and the name of his principal.[73]

For failure to disclose his principal he makes himself personally liable to the persons with whom he deals.[74] And by exceeding his authority to represent and bind the principal he makes himself personally responsible, as by warranty of his principal's title. He is held to be responsible to the true owner for selling goods given to him to sell by one having no title, as a thief. But he is not liable for

[72] Broughton v. Silloway, 114 Mass. 71.

[73] Hicks v. Minturn, 19 Wend. 550 (N. Y.); Steele v. Ellmaker, 11 Serg. & Rawle 86 (Pa.); Schoenfeld v. Fleisher, 73 Ill. 404.

[74] Meyer v. Redmond, 141 App. Div. 123 (N. Y.), LEADING ILLUSTRATIVE CASES.

failing to sell property as advertised, though parties have been put to expense and trouble in order to attend the sale.

119. **Rights of auctioneers.**—As to his principal, the auctioneer is entitled to be indemnified for all authoritative acts within the scope of the employment, and to be compensated for his services as agreed or at the statutory rate, and for costs and expenses. He is given a lien on the goods of the principal or on the proceeds of the sale for his charges and compensation.

The auctioneer, as against a wrongdoer, is regarded as having a special property in the goods entrusted to him, and may recover for any injury done them, but he cannot dispute the title of his principal to the goods.

120. **Brokers.**—The occupation of a broker is to bring parties together for the purpose of bargaining, or to make bargains for them in various commercial matters. Brokers may be divided, according to the class of transactions in which they deal, into money brokers, stock brokers, ship brokers, bill brokers, insurance brokers, real estate brokers, and merchandise brokers.

A bill and note broker negotiates the sale and exchange of promissory notes and bills of exchange. An exchange broker negotiates the transfer of foreign or domestic bills of exchange. An insurance broker negotiates deals between parties seeking insurance and the insurance company, usually representing the insured and not the company. A merchandise broker negotiates sales of merchandise be-

tween parties, but does not take possession or control of the property sold, as do factors.

Bouvier defines a stock broker as one "employed to buy and sell shares of stock in incorporated companies and the indebtedness of government." In buying and selling stocks and securities he is a mere agent of the principal, but stock brokers are now customarily employed not only to act as agents for the principal, but upon his authority to buy stocks on their own credit or with their own funds, as a matter of speculation, for which they charge a stated commission. This is the method followed by stock exchange brokers.[75]

121. **Appointment and implied powers of brokers.** —In the absence of statute no special mode of appointing or authorizing a broker is necessary, and the authority may be given by parol or in writing, or may be implied from acts and conduct of the parties.[76] The implied powers of the broker duly authorized are not extensive; as he is not possessed of the goods or property, his duties are rather to assist the parties to act for themselves than to represent them. The usages which have grown up in the particular transactions which he makes, assist in determining and fixing the limits of his implied powers. These commercial usages are enforced by the courts when reasonable. The principal is supposed to give the authority with reference to well-known usages of the business, but usage will not suffice to authorize a broker to act contrary to ex-

[75] Mechem, Agency, § 936. See Markham v. Jaudon, 41 N. Y. 235.
[76] Howe Machine Co. v. Clark, 15 Kan. 492.

press instructions. All reasonable and necessary powers to conclude the transaction for which he was engaged are implied.

He has no authority to delegate his employment; or to act for any but the party employing him, except with the knowledge and consent of both parties whom he seeks to represent; or to go outside of his instructions, except in cases of emergency. He should act only in the name of the principal, and as a rule has no implied power to act in his own name.[77] If employed to buy or sell property and not instructed as to price, he has implied authority to pay or receive in good faith the usual market price. He has no authority to receive payment unless expressly conferred, but, having the right to arrange the terms of sale, he may give reasonable credit, unless usage forbids.

122. **Duties and liabilities of a broker.**—The broker is held to the ordinary skill and diligence which is exercised by others in the line of his employment, and for a failure to exercise such reasonable and usual discretion and diligence he will be liable to his principal for the loss suffered by him. He is required, as are all agents, to be loyal to his principal, and this forbids his buying from or selling to himself without the knowledge and consent of the principal. He cannot, for the same reason, act for both parties without the full knowledge and warrant of each.[78]

By concealing his agency and the name of his

[77] Saladin v. Mitchell, 45 Ill. 79.

[78] Alexander v. Northwestern Christian University, 57 Ind. 466.

principal he makes himself liable upon the contract. So he may expressly charge himself by buying on his own credit, but in order that he may do so when the principal is known, the facts must be clear. He becomes personally liable when he assumes to act for a principal and lacks the requisite authority to bind the principal.

123. **The broker's rights.**—From the principal the broker is entitled to compensation, and this is usually a commission or percentage on the value of the undertaking or employment. This rate of commission may be established by a custom or usage when not expressly fixed. To be entitled to compensation, the broker must prove his employment, and further that it has been performed according to the terms. The principal's right to sell real estate himself continues after the employment of a broker for the same purpose, unless he has expressly waived the right; and for a sale by the principal the broker can claim no commission unless the sale was the result of his own efforts.[79] But the principal cannot cut off the broker's right to compensation by revoking his authority before the time set for its termination, and for so doing he is liable to the agent in damages. The principal may employ two or more brokers unless he has given one an exclusive authority to sell.

For all costs and expenses assumed by the broker, and for all losses and liabilities incurred in good faith in the line of his authority, the principal must indemnify him. In case the undertaking is entire

[79] Hungerford v. Hicks, 39 Conn. 259; Keys v. Johnson, 68 Pa. St. 42.

and is not completed by the broker, his right to reimbursement and indemnity depends upon the same principles which govern his right to compensation. If his employment did not contemplate payment unless the sale was consummated, he cannot, in the absence of special agreement, recover for expenses incurred.

The broker has no general lien, not having possession of property, but in certain cases he has a particular lien. Thus, an insurance broker may have possession of the insurance policies negotiated by him, and he has a retaining lien for his costs and charges in securing them.[80]

As against third persons the broker has no special property to protect and is only called upon to sue personally in case he has contracted in his own name, or is the real principal, or has a special interest in the subject matter of the contract.

124. **Appointment and implied powers of factors.** —Factors are persons employed to sell goods upon commission. Their appointment may be by parol, in writing, or inferred from conduct. No formal grant of authority is necessary. Their powers may be expressly limited, and unless limited they include, by implication, not only those necessary and usual to complete the purpose of the employment, but also those customary powers established by well-known commercial usages.[81]

A factor has implied power to sell on credit unless limited in this regard by special instructions or

[80] Barry v. Boninger, 46 Md. 59.
[81] Owings v. Hull, 9 Peters 607 (U. S.).

usage, but must exercise a reasonable discretion as to whom to trust; also to sell in his own name, to warrant quality, and to receive payment. He may pledge the goods in his possession for charges or duties levied upon them, but cannot pledge them for his own personal debt.[82] Where the factor pledges without authority, as for his own debt, the pledgees take no title as against the owner, unless, as is the case in several states, the statutes, or Factors' Acts, protect those who have dealt in good faith with the factor, believing that he was the owner of the goods entrusted to him.

125. **Duties and liabilities of factors.**—Factors also must exercise that degree of skill, diligence and prudence which is current in the employment they profess to follow. They are bound to be faithful and loyal to their principal, and to keep themselves from assuming adverse interests or from representing the other party to the transaction. It is their duty to obey reasonable instructions from the principal, and to safeguard his interests. They should inform the principal of facts coming to their knowledge in relation to their agency and material to the principal's interests. For failure to perform these duties they are liable to the principal for the loss suffered by him.

126. **Rights of factors.**—The factor is entitled to compensation from the principal, usually a commission fixed by agreement, by usage, or upon a *quantum meruit.*[83] For all advances and expenses in-

[82] Wright v. Solomon, 19 Cal. 64.
[83] Zurn v. Noedel, 113 Pa. St. 336.

curred on the principal's behalf within the performance of the undertaking, the factor is entitled to be reimbursed by the principal. For all acts within the limits of his authority and all liabilities incurred in the discharge of his duties he is to be held harmless by the principal. He is given a general lien upon all goods of the principal of which he has the possession, and upon the money or security realized from their authorized sale, to secure the payment of all amounts due him by the principal in reference to the particular goods, or any general balance due under the contract of agency. But the lien does not extend to protect a debt contracted prior to, and without reference to the agency.[84]

As against third persons, the factor can sue for the purchase price of the goods, or upon a note taken in payment from the purchaser. He also may sue upon the contract if made in his own name, and maintain an action for trespass, trover, or replevin against those who injure the goods or seek to take them without authority.[85]

BIBLIOGRAPHY.

Floyd R. Mechem, A Treatise on the Law of Agency; *Ernest W. Huffcut,* The Law of Agency; *Francis B. Tiffany,* Handbook of the Law of Principal and Agent, "Hornbook Series"; *Floyd R. Mechem,* Outlines of the Law of Agency (2nd ed.); *Joseph Story,* Commentaries on the Law of Agency; *William Bowstead, Esq.,* Digest of the Law of Agency; *Mechem's* Cases on Agency; *Huffcut's* Cases on Agency (2nd ed.); *Reinhard's* Cases on Agency; *Wambaugh's* Cases on Agency.

[84] Jordan, Ellis & Co. v. James, 5 Ohio 88.
[85] Beyer & Co. v. Bush & Son, 50 Ala. 19.

LAW OF SALES OF PERSONAL PROPERTY

BY

H. CLAUDE HORACK Ph.B. LL.B.*

CHAPTER I.

GENERAL NATURE OF SUBJECT.

1. **The Uniform Sales Act.**—Frequent reference is made throughout this article to the Sales Act. This is an act which has been drawn up by Commissioners on Uniform State Laws who have been appointed by the various states for the purpose of bringing about uniformity in the laws of the different states relating to commercial subjects. This act was recommended by the commissioners to the legislatures of the several states for passage, and has already been adopted in Arizona, Connecticut, Maryland, Massachusetts, New Jersey, New York, Ohio, Rhode Island, and Wisconsin.

The act states the law of sales as it has been developed in this country, being for the most part a codification of the existing legal principles which are generally considered sound, rather than an attempt to change established doctrines, except in the few

* Professor of Law, State University of Iowa; formerly Assistant Professor of Law, University of Wisconsin.

instances where commercial usage is at variance with legal decisions. On most points it sets forth, very concisely and accurately, the principles of the law of sales.

2. **Definition and scope of subject.**—The definition given in the Sales Act[1] is: "A sale of goods is an agreement whereby the seller transfers the property right in goods to the buyer for a consideration called the price."

The law of sales deals only with questions concerned with the transference of property in chattels, and though real estate transfers are often spoken of as sales, such transactions should more properly be spoken of as conveyances and the term "sale" used with reference to the transfer of title to personal property.

The subject of sales is closely connected with the subject of contracts, since contract is concerned in every case of sale, the actual sale being the result of the contract to sell, which is often spoken of as an executory sale. But it is only as such a contract is actually carried out so that it accomplishes the transference of property from one party to the other that it can properly be called a sale as distinguished from a contract to sell.

The vital point to be considered in sales is the transfer of the property right in a thing from one person to another. This right of ownership or property right in the thing is called "title," and it is entirely with the question of the transfer of title to personal property that the law of sales deals.

[1] § 1 (2).

Title is defined as "that which is the foundation of ownership of property";[2] "the channel through which an owner has acquired his right; the collection of facts from which, by the operation of law, his right arises."[3] Thus when it is said that "risk attends title," it is meant that the one who has the title to goods is ordinarily the owner thereof in such a way that any loss caused by the injury or destruction of the goods will fall upon him. They are his property, and it will be his loss.

3. **Sale distinguished from other transactions.**—A sale is to be distinguished from barter, gift, bailment, pledge, and chattel mortgage.

Barter. A barter is an exchange of goods for other goods, while a sale is an exchange of goods for money. Though a distinction is usually drawn between the two transactions no real difference in principle exists. In one case the consideration is other goods, and in the other case money, but this difference is not material and the two transactions are in all ways governed by the same rules.

Gift. A gift differs from a sale in that no consideration is given for the transfer of title, and in order to perfect a gift, delivery, either of the chattel itself or something which represents it, is absolutely essential, while title may pass in the case of sale without delivery.

Bailment. While the vital thing in a sale is the passing of title to the chattel, in bailment there is no parting with title at all, but merely a giving up of

[2] Hunt v. Eaton, 55 Mich. 362.
[3] Century Dictionary.

possession. There may be a sale, i. e., a passing of title, without the possession being transferred if the parties so intend, while in bailment there is never a passing of title but always the giving up of possession and possession only.

Pledge. A pledge is a bailment made for the purpose of security for a debt, and there is no change in the property right in the thing pledged contemplated by the parties, other than as this may later become necessary in order to realize upon the security if the debt or other obligation for which the pledge has been given is not satisfied.

Chattel mortgage. A chattel mortgage is given only as security and here also the purpose is not to change the property right in the thing mortgaged unless the obligation for which the security is given is not paid. The chattel mortgage is usually stated to consist of the passing of the title to personalty for the purpose of security only, subject to the provision that the title shall revest in the one giving the mortgage upon his satisfying the terms on which it was given. The security in this case is not, however, as in the case of the pledge, dependent upon possession. The whole purpose of the transaction is the giving of security, while the whole purpose in the case of a sale is the complete and absolute change of the rights and ownership in the thing.

CHAPTER II.

SUBJECT MATTER OF SALES.

4. **Property must be in existence.**—Since the law of sales deals with the transfer of title to property one must be able to point out the particular property about which the parties are dealing before he can talk about the transfer of title. Title can be spoken of only with reference to specific property, and cannot be thought of apart from it any more than one can think of a shadow apart from and unrelated to the substance which casts it.

A man can only transfer title to something which he has. Until he has it, he has no title to transfer and the most that he can do is to contract that when he does get it he will sell it. But that is merely a contract to sell and not a sale,[4] and, if the thing which the parties are dealing about has ceased to exist, there can be no sale since the seller now has no property and no title to pass. Suppose that A intends to sell his horse to B and B intends to buy it, but, unknown to both of the parties, the horse which was to be the subject matter of the sale has died. There is no sale for the simple reason that A had no horse at the time of the intended sale and therefore has no title which he can pass. A does not own a horse, but merely owns a carcass. But B does not purport to be buy-

[4] Sales Act, § 5 (3). "Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods."

ing a carcass and therefore there is no sale. There is no longer any horse and consequently no title to a horse which may be transferred.[5]

5. **Potential property.**—There is a class of cases which at first sight would seem to be in conflict with the rule that property must be in existence before there can be an actual sale thereof. This is where the property, though not now actually existent in its final form, may come into existence in the future through the course of nature. Thus, if one owns certain sheep, the wool which will be grown upon those sheep in the coming year may be said to have such a "potential" existence as to make it the subject of a present sale. The owner of the sheep has potential wool, that is, he now owns that which in the course of nature will develop into wool. He has an actual present right in something and he may sell it.

But what would the buyer get in such a case? Is he purchasing wool? No, that cannot be, for there is as yet no such actual thing as next year's wool *as wool* now in existence. Whatever the buyer gets, he gets now, at the time of the sale. When the wool as actual wool finally comes into existence and is cut from the sheep, the title is in the buyer without any further act on the part of the seller. As wool it never was owned by the seller. All he ever owned was potential wool, that is, wool not having actual existence as such, and this was what he sold. When it actually came into existence, it came into exist-

[5] Sales Act, § 7 (1). "Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have wholly perished at the time when the agreement is made, the agreement is void."

ence as the property of the buyer, and even an innocent purchaser from the seller would have gained no property right in it.

6. **Two views of potential property.**—The courts have differed materially as to when a thing has such potential existence as to make it the subject of sale. One line of cases holds that if a man owns that from which property may be produced, he has a potential property in the produce for any definite time in the future. Thus, if one owns land, he may sell the crop of corn which will be produced thereon ten years hence.[6]

The other view, which seems much more reasonable, maintains that a particular crop can be considered to have potential existence only after the seed has been planted and has started to germinate.[7] Or, in the case of animals which are to be born in the future, they are not considered to have potential existence until the period of gestation has commenced. This seems the better view, since, even in this limited form, the doctrine of potential property, of future property as already having such existence as to make it the subject of present sale, seems to be a most extreme idea.

7. **What things may have potential existence.**—As stated above, a man may have potential property only in that which may be produced in the course of nature from that which he already owns. Thus, a man has no potential property in a catch of fish which he expects to make, even though he has a ship

[6] Grantham v. Hawley, Hobart 132 (Eng.), LEADING ILLUSTRATIVE CASES.
[7] Merchants' and Mechanics' Savings Bank v. Lovejoy, 84 Wis. 601, 609.

and nets and all the other appliances necessary for catching fish.[8] He has no property, actual or potential, in any fish until they are actually caught, and hence cannot pass any property right in them until that time. The most that he could possibly do in such a case would be to contract to sell them when he caught them. They would be his when he caught them and he would have to transfer the title later, if he wished to perform his previous contract.

8. **Future-acquired property.**—Since property must have existence either actual or potential, there can be no present sale of things which are to be acquired in the future, or are still to be made. There may be a contract to sell a ship which is to be built, or a horse which is to be purchased from another, but there can be no actual sale until the thing is actually acquired by the seller. He cannot sell it, for he does not have it to sell.

Though all courts admit that there is no sale at law in such a case, yet many courts do give some effect in equity to such a bargain as between the parties themselves if the one promising to sell the after-acquired property is insolvent, and no rights of innocent third parties have intervened. This does not make it a sale, however, but merely compels the performance by the seller of the contract to sell which he had validly made. The buyer in such a case would have no adequate remedy otherwise, since the seller, being insolvent, is not able to pay damages for the breach of the contract.[9]

[8] Low v. Pew, 108 Mass. 347, LEADING ILLUSTRATIVE CASES.
[9] Holroyd v. Marshall, 10 H. L. Cas. 191 (Eng.).

CHAPTER III.

IDENTIFICATION OF THE GOODS.

9. **Goods must be specified.**—Since sales deal with the passing of title, there must in every case be specific property, which can be pointed out, the title to which is to be transferred. This is expressed in the Sales Act[10] as follows: "Where there is a contract to sell unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained." If a person owns ten horses he may sell a one-tenth interest in all his horses, but he cannot sell any one of his ten horses. Title to one horse can pass only when an agreement has been made as to the particular horse which is to be the subject of the contract. He might agree to allow the purchaser to make a choice and take title to any horse in his herd, but this is as yet nothing but a contract to sell and there will be no passing of title under this agreement until the selection has actually been made.[11]

10. **Mutual assent to passing of title.**—Not only must the goods be specified, but, further, the parties must have agreed, the one to pass and the other to take title to the particular thing. Suppose that A, owning ten sacks of sugar, all of the same brand

[10] § 17.

[11] Robinson v. Stricklin, 73 Neb. 242, 102 N. W. 479, LEADING ILLUSTRATIVE CASES.

and quality, offers to sell one sack to B. It cannot reasonably make any difference to B which sack he is given, yet until he has agreed in some way that a particular sack shall be his or has permitted A to select and set aside one for him, there can be no passing of title. No matter how definitely A might appropriate one sack to B, as by setting it aside and marking it with B's name, still he cannot pass title to it unless or until A has assented to such an appropriation being made.[12]

11. **Previous assent.**—However, if the buyer leaves it to the seller to select the goods which are to answer the contract, there may be a passing of title thereto, if the parties so intend, when the seller definitely appropriates to the contract goods of the kind bargained for. There is in such a case a clear agreement upon the goods to which title is to pass, i. e., one gives his assent to take title to whatever goods the other may definitely appropriate to him. This has been stated in the Sales Act[13] as a rule for determining when the parties have intended that title should pass, as follows: "Where there is a contract to sell unascertained goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer." If the title has thus passed, all the consequences of the passing of title must follow. If it is agreed that

[12] Wheelhouse v. Parr, 141 Mass. 593, 6 N. E. 787, LEADING ILLUSTRATIVE CASES.

[13] § 19, rule 4 (1).

title shall pass to whatever goods the seller may select and set aside for the buyer and such selection has been made, then if those goods are afterwards destroyed the loss is upon the buyer; and on the other hand, if after such appropriation the seller should take back the goods which he has set aside for the buyer and replace them with other goods of the same kind and quality, the seller would be guilty of converting the goods of the buyer and the buyer would not be obliged to accept the substituted goods.

12. **Passing of title by delivery to carrier—Buyer paying transportation charges.**—The most usual case of previous assent given by one party to the other to select goods and pass the title to them is where goods are ordered from a distance. Here the buyer merely asks for goods of a certain description and it must be understood that he leaves it to the seller to select the particular goods to which title is to pass. He says in effect, "I agree to accept as the goods which are to be the subject matter of the sale whatever goods you may select of the description ordered." But at what time, by this contract, will the buyer accept the title to the goods? He may, of course, fix any time he pleases as the moment when title is to pass, but in the absence of an express agreement, what is the understanding and intention of the parties? Since the goods are soon to pass out of the actual possession and control of the seller, it has seemed reasonable to fix as the exact moment for the passing of title, the time when the goods are given up by the seller and are no longer under his actual control or that of anyone acting specially for

him, that is, when they are given into the possession of the carrier. This rule, that title will pass when goods are given into the hands of the carrier, though somewhat arbitrary, is not at all unreasonable. We are merely trying to find out when the parties intended the title to pass, and in the absence of any showing of a contrary intent it is fair to presume that this is the moment which the parties had in mind. This presumption as to intention is thus stated in the Sales Act:[14] "Where in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract," with certain exceptions which will be later referred to. Though the carrier is not strictly the agent of either of the parties, but is a public servant acting for anyone who may apply, still when the buyer is paying the freight, it may fairly be said that in carrying the goods, the carrier is acting more for the buyer than for the seller, when the seller has given up his control over them.

13. **Same subject—Seller paying transportation charges.**—Applying the same line of reasoning, when the seller pays the freight, the carrier in acting is more directly representing the seller than the buyer, and it cannot be said that the seller has completely given up his control over the goods. Here, again, in the absence of an expressed intention of the parties, we must adopt some rule, as a presump-

[14] § 19, rule 4 (2).

tion, to guide us in determining what is the intention of the parties. This presumption as expressed in the Sales Act[15] is that, "If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

14. **Sale of goods to be separated from a mass.**—Since the minds of the parties must have met as to the particular goods which are to be the subject matter of the sale, there cannot be a passing of title to any particular goods which are mixed with others of the like kind so as to be indistinguishable. Thus, if A has a bin containing one thousand bushels of wheat, he cannot pass title to one hundred bushels thereof until the same has been separated so as to be identified as the exact one hundred bushels, title to which the parties have intended to pass. Until separation the buyer cannot point to any one hundred bushels of grain and say, "That is my wheat." If the parties intend that there shall be ownership given in one hundred bushels as such, then there is nothing but a contract to sell until actual separation is made.[16]

15. **Sale of portion of mass.**—Though the parties cannot make a present sale of one hundred bushels of wheat without separating it from the mass, yet they may make a present sale of a certain interest

[15] § 19, rule 5.

[16] Courtright & Co. v. Leonard et al., 11 Iowa 32, LEADING ILLUSTRATIVE CASES.

in the whole mass and immediately pass title. A may sell to B a one-tenth interest in all the grain in the bin and the parties will at once become tenants in common in the proportion of nine to one in all the wheat. But the mass in which they are to have such ownership must be definitely specified. Under such a bargain no particular part of the mass belongs to one or to the other, but each has a proportionate interest in every particle of wheat in the whole mass.[17] The case is no different from that of parties who each own a half-interest in a cow. One does not own the front half or the hind half, nor do they divide their interests laterally. The only difference is that in one case there may be an understanding that either will have a right to separate his proportion from the rest and change the tenancy in common into individual ownership, while in the other case any such attempt might cause such serious results that it cannot be supposed that such was the intention of the parties, and there can be a separation of interests only by making a sale and dividing the proceeds.

16. **Sale of portion of mass in terms of a definite quantity.**—It is possible that a buyer may wish to buy one hundred bushels of grain, which are now a part of a larger mass, desiring to store the same with the other grain of the seller. Is it possible, then, for him to get a property right in a portion of the mass when he buys in terms of a definite quan-

[17] Sales Act, § 6 (1), provides: "There may be a contract to sell or a sale of an undivided share of goods. If the parties intend to effect a present sale, the buyer, by force of the agreement, becomes an owner in common with the owner or owners of the remaining shares."

tity? Suppose that he has purchased one hundred bushels and has separated the same from the general mass. Clearly the title to that one hundred bushels has passed to him. If he now bargains with the seller to store this one hundred bushels with the other grain of like kind and quality which is in the seller's bin, certainly he will not lose all rights of property by mixing his grain with that of the seller. It is true that he can no longer point to any specific one hundred bushels of grain to which he holds the title. If this is so then what property right does he have? If he now has any property right whatever it must be in the nature of tenancy in common with the owner of the other grain in the entire mass which has resulted from the mixture. What then is his ownership in this resultant mixture? If he knew that the seller had exactly nine hundred bushels, he knows that, by mixing his one hundred bushels with the nine hundred bushels of the seller, his proportion becomes one hundred one-thousandths, or one-tenth, of the whole mass.

But suppose that the quantity belonging to the seller is not exactly known, then, after the buyer's one hundred bushels are added, he knows that, though he cannot name the exact fraction which represents his interest in the whole mass, yet he owns such a proportion of the mass as would yield him one hundred bushels if the parties should now attempt to separate their interests. In other words, the whole quantity, the exact amount of which is unknown, may be represented by x. His proportion will be this fraction, $\frac{100}{x}$. It is a definite amount and

tenants in common, where the goods which are the subject of the contract are fungible, that is, goods which are always sold by weight or measure, so that it can make no difference to the buyer whether he is given one portion of the goods or another, it is much more difficult to infer that they intended such a tenancy in common with reference to goods which are not ordinarily dealt with in this way, such as barrels of pork or of flour, unless the parties have distinctly stated their desire to assume such ownership. No court has applied the rule that it is possible that parties may have intended to assume an ownership of a portion of the mass though dealing in terms of a definite quantity, except in case of goods which are deemed fungible. But the courts have differed very much as to what goods come within this description, though it seems clearly the better view to apply the rule only to such goods as grains, oils, or other goods which are ordinarily stored in mass and which are always dealt with by weight or measure, where one unit is necessarily like every other unit and it can make no difference to the purchaser which particular unit is finally separated and assigned to him as his individual property. The doctrine of Kimberly v. Patchin has been incorporated into the Sales Act,[21] though it has not been approved by all American courts, and has been repudiated by the English decisions.

19. **Goods made to order.**—When one person orders goods of a certain kind to be made by another, the question arises as to when they intend that

[21] § 6 (2).

title to the goods to be made shall pass. They may have in mind any one of three things. First, that the contract is merely a contract for work and labor, and that whatever materials are furnished on which the labor is to be performed, are at once to become the property of the one for whom the work is to be done. Such a contract is not usually considered as a sale, even though there is a passing of title to the materials, piece by piece, as they are furnished in compliance with the contract. Second, the parties may intend the passing of title to some article in an incompleted state, as for instance a ship in the process of construction.[22] In such a case there is of course no difficulty in the passing of title to the thing as it then exists, and any further materials are furnished, and any further work upon such uncompleted article is done, for the buyer. Third, the parties may have in mind that title is not to pass until the thing contracted for is completed. This is the case if the seller may fulfill his contract merely by furnishing a thing of a specific kind at a certain time, i. e., the subject matter of the contract is not identified until it is completed and in some way definitely appropriated to the contract by the acts of the parties.

It may be that the mere fact of giving an order for something to be made according to the special direction of one of the parties may be considered as a previous assent given by him to the seller to appropriate to the contract any article which he may make which answers the terms of the bargain. This view

[22] Woods v. Russell, 5 B. & Ald. 942 (Eng.).

has been taken by some courts. Until such an appropriation has been made, the title to the thing, whether completed or incomplete, still remains in the seller with the result that he may do with it as he pleases, may sell it to someone else, and must also bear the risk of loss. The whole question is, has the subject matter of the contract been identified by the parties and appropriated to the contract by the assent of both parties? Unless this is the case no title can have passed.

There is a great tendency on the part of most courts to treat such contracts not as contracts of sale, but as contracts for work and labor, unless the intention of the parties to the contrary is clearly expressed. The reason for this tendency is that the statutory provisions, which are found in practically all jurisdictions, require contracts for the sale of goods of a certain value to be in writing or to comply with other requirements in order to be enforcible by the courts.[23]

[23] See Chap. XIX, §§ 143 to 147, for further discussion of contracts for work and labor.

CHAPTER IV.

UNASCERTAINED PRICE.

20. **Weighing or measuring still to be done.**—In the case of Hansen v. Meyer,[24] it was stated that "If anything remain to be done on the part of the seller as between him and the buyer, before the commodity purchased is to be delivered, a complete present right of property is not attached in the buyer." The proposition as thus stated seems to lay down a hard and fast rule that title cannot pass where something remains to be done on the part of the seller, such as weighing or measuring, in order to determine the price, but in later cases the rule was modified so that it is now merely a rule of presumption to aid us in determining whether or not the parties really intended that title should pass under such circumstances.

21. **By whom acts are to be done.**—If the acts still remaining to be done are to be done by the buyer, then it is presumed that they are merely for his satisfaction and were not meant by the parties as showing an intention that title should not pass until they were performed. But if the acts are to be done on the part of the seller it is somewhat more reasonable to suppose that he does not intend to give up his property right in the goods until he is

[24] 6 East 614 (Eng.).

entirely sure of the exact amount to which he is to be entitled as the purchase price, though the same reason would not apply when such acts are left to the buyer who would thus determine the amount due. Having given up the possession and control of the goods, there is nothing in the conduct of the seller to give the inference that he does not mean to pass the title also, but rather he appears to be perfectly willing to pass the title and shows his trust and confidence in the buyer by leaving it to him to determine the exact price.

22. **Effect of the presumption.**—It should be borne in mind that the rule as we now have it with reference to acts of the seller still remaining to be done, as preventing the passage of title, is merely a rule of presumption, that is, it is simply a rule to aid us in determining what is the actual intention of the parties, and not an absolute rule as it was perhaps originally understood, which should prevent the passing of title. Thus, if A sells to B all the grain in a certain bin at the rate of one dollar per bushel, it is presumed that A has not meant to give up his title until he has actually determined the quantity and thus fixed the exact amount to be paid, and in the absence of any evidence to the contrary we would assume that such was his intention. However, if the buyer can show that even though the seller was to do the weighing and measuring, it was the intention of the parties to pass the immediate property right to the goods, such evidence would overcome the presumption and the title would be determined to have passed.

This rule of presumption is a way of getting at what the parties intended in the absence of any evidence, but it will be overcome and their actual intention given effect if the proper evidence can be produced. It is to be noticed that this rule is properly applied only in cases where the goods are distinctly specified, to determine whether the parties intended title to pass with reference to these goods. It should not be confused with the rule that goods must be identified, and if the thing remaining to be done is some act necessary to specify the goods which shall be the subject of the contract, then the minds of the parties have not met with reference to the particular goods and there is as yet no possibility of the transference of title. It is a presumption to help determine whether the title to particular goods has passed, and not for the purpose of determining to what goods the parties intended to pass title.

CHAPTER V.

SALES ON CONDITION.

23. **Contracts to sell on condition.**—When the parties in contemplating a sale of goods have not intended that there shall be an immediate passing of title, their bargain must be in the nature of a contract to sell rather than a sale. If they have fixed some time, or the happening of some event, in the future as the time when the title shall pass, until such time there can be no sale. This is true even though the parties have made a transfer of possession of the article which is the subject matter of their contract. Thus if A should give his horse into B's possession with the understanding that if he proves satisfactory B shall pay A one hundred dollars, the horse is still A's horse, for the parties do not contemplate the passing of title until some future event. It will turn into a sale upon the happening of a certain condition, i. e., if the horse proves satisfactory to B. Before the horse can actually become the property of B there must be some intent to take title as shown either by the buyer's acts or conduct.[25] The Sales Act[26] states the rule thus: "When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer when he sig-

[25] Hunt v. Wyman, 100 Mass. 198, LEADING ILLUSTRATIVE CASES.
[26] § 19, rule 3 (2).

nifies his approval or acceptance to the seller or does any other act adopting the transaction."

24. **Sale and return.**—A situation which at first glance seems very much like the contract to sell, is an agreement of "sale and return." Here the parties contemplate an immediate passing of title with a further agreement that the buyer may have a right to pass the property back upon the happening of some future event. Thus A sells his horse to B for one hundred dollars, the parties meaning and intending that not only possession but also the property right shall be changed at once, but with the further agreement that if the horse does not prove satisfactory B may return him. If B does so return the horse properly he may recover back any money which has been paid, but until he has done so the horse is his and he merely has by this agreement the right to pass the title back to the seller.[27]

The statement of the law as given in the Sales Act[28] is: "When goods are delivered to the buyer 'on sale or return,' or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or if no time has been fixed, within a reasonable time."

25. **Risk of loss in above cases.**—In the above case of sale on condition, which really amounts to nothing

[27] Carter v. Wallace, 32 Hun 384 (N. Y.), LEADING ILLUSTRATIVE CASES.
[28] § 19, rule 3 (1).

more than a contract to sell under certain conditions, since the property right remains in the seller until some future time when the buyer determines to take title, it follows that the risk of loss is upon the seller, for in the meantime the horse is his, and therefore, if the horse is injured or destroyed without fault of either party the loss must be on the one who at the time is the owner, that is, the one who has contracted to sell.

But in the second case where the agreement is for the sale and return, the horse is at once the property of the buyer and the risk of loss is upon him. Therefore if the horse should die before the buyer has exercised his right to return, which really amounts to a right to pass the title back, the buyer must bear the loss, for it is his horse which has died, and he now has no horse to return, that is, he has no title to a horse to pass back.

26. **Cash sales.**—Where the parties intend that there shall be no property right in the thing transferred until the price is paid, before this event has taken place there is nothing but a contract to sell. This is the situation in the case of sales of goods over the counter where no credit is extended. Here the merchant does not intend to part with his goods until he receives the money and even though the merchant should place the goods in the customer's hands, if it is with the understanding that the money shall at once be paid, the customer gets no property right in the goods until the payment is made. The cases are not, however, limited only to sales of goods over the counter, but the principle also applies to

any case where a strictly cash transaction is intended, that is, where immediate payment of cash is contemplated, the parties do not intend to pass title until such payment is made. Such sales, however, should be distinguished from the special cases where, although the parties do intend the transfer of a present property right in the goods, they still, for the purpose of security, put off the transfer of the actual title until payment which is to be made at some later time.[29] But it should not be inferred that in every sale which is stated to be "for cash" there is no passing of title until actual payment. The whole question is one of the intention of the parties. "The phrases 'terms cash' and 'cash down' may or may not import that payment of the price is made a condition precedent to the transfer of title, according to the intent of the parties. If by the use of these terms the parties understand merely that no credit is to be given, and that the seller will insist on his right to retain possession of the goods until the payment of the price, the sale is still so far completed and absolute that the property passes; but if it is understood that the goods are to remain the property of the seller until the price is paid, the sale is conditional and the title does not pass."[30] But here, as in all other cases, "For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case."[31]

[29] See Chap. VI.
[30] Clark v. Greeley, 62 N. H. 394.
[31] Sales Act, § 18 (2).

CHAPTER VI.

TITLE RESERVED FOR SECURITY.

27. **Nature of transaction.**—The term "conditional sale" has come to be applied to a particular class of cases in the law of sales, differing entirely from the sales made upon some condition as discussed in the previous chapter. In the sale on condition, there is some condition named which is precedent to the passing of title, and until this condition is complied with there is no actual sale but only a contract which may, upon the happening or performance of the condition named, result in a sale. In the case of what is technically termed a "conditional sale," the sale really takes place at once with a provision for the revesting of the property rights in the goods in the seller if he wishes, if there should be default in payment. In one case the making of the sale is dependent upon some condition and in the other case it may be defeated upon the happening of some condition arising after the sale has been in fact made. In conditional sale, as the term is thus used, the parties intend the present transfer of all property rights in the subject matter of the sale with a special agreement whereby the title is reserved by the seller, not for the purpose of preventing a change of ownership but merely for the purpose of giving to the seller adequate security for the purchase price.

28. **Compared with chattel mortgage.**—At first glance it might seem impossible for the parties to intend to change all property rights in the goods without passing the title also. But something very similar to this is accomplished by giving a chattel mortgage for security. Suppose that A wishes to borrow one hundred dollars from B, offering as security therefor a certain horse. He might give to B as security for the loan a chattel mortgage on the horse, which would consist of a document in form transferring title to him, with a clause providing that the transfer shall be defeated upon the payment at a certain time of the sum of money secured by the mortgage. The mortgagor, the one borrowing the money, has not meant to give up his entire property right in the horse in the meantime, but has only intended to give security to the mortgagee, the lender, for the sum of money advanced.

The parties may intend to accomplish the same result without going through all the formality of the seller first transferring the title absolutely to the buyer, and the buyer then transferring it back conditionally as security to the seller. They may accomplish the same purpose if the seller should in the first instance retain such title in himself for the purpose of security and yet intend to pass and the other party intend to receive all other property rights in the goods, the seller giving up such title when security is no longer needed, that is, when the purchase price is paid, just as, in the case of a chattel mortgage, the mortgagee gives up his title upon the payment of the debt which the mortgage was given to secure.

29. **Same subject.**—But during all this time, in the case of either a chattel mortgage or a conditional sale, the parties intend that all property rights in the goods shall be in one case in the mortgagor, and in the other case in the buyer, and in each case there is a definite amount of money due, for which the title only is held as security, which must be paid in order that the real owner may again assume absolute and complete ownership and control over the goods, and which, if not paid, will give the mortgagee in the one case, or the seller in the other, the right to realize on his security in order to secure for himself the payment of the sum of money which is due. Though the two transactions are very similar and aim at the accomplishment of the same result, they are treated in the law as distinct and separate subjects, though the principles which apply to one case may by analogy be applied to the other. The situation, therefore, seems to be that even though title is retained by the seller for security until payment of the purchase price, if the parties actually intend that in all other ways and for all other purposes there shall be an actual sale of the goods and a transfer of the property rights in the same, the law will give effect to their intention and treat the transaction as creating what they have called a "conditional sale."

30. **Contract in form of a lease.**—Often the seller, in order to conceal the exact nature of the transaction, thus hoping to retain a greater power over the goods, will designate the transaction as a lease, calling the payments to be made rent. However, the

court will not be deceived by names, and if the real intention of the parties is to give the seller security for the purchase price, and make the buyer indebted for a certain sum to be paid in installments, upon the full payment of which he is to receive title, the court will declare such a transaction what it really is, a conditional sale, regardless of what the parties have called it, and will treat it as such in working out all the rights of the parties, and in determining what the liabilities of each of them are.

31. **Provisions for forfeiture or resale.**—Provision is often made in such contracts giving the seller the right to resell the property or to reclaim it and keep it as his own if the buyer is in default in any of his payments, and also stipulating that the buyer, if in default, shall forfeit any payments which he may have made upon the purchase price. If the buyer has agreed to thus give up his property rights upon being in default there seems no legal reason why he should not be held to his bargain if it was fairly made in the beginning. "It is for the parties, and not the courts, to make contracts." However, since there is so great opportunity for the unscrupulous to take advantage of the improvident through such harsh bargains, the right to declare and give effect to such forfeiture has been limited by statute in many states. Where such forfeitures are thus regulated, the parties often resort to the form of a lease in order to conceal the nature of their transaction, but as stated in the previous section, the court will, in such cases, look at the facts, and declare the transaction to be what the parties have

really intended it should be and not what they have called it.

32. **Risk of loss.**—Nothing will show more clearly where the actual property interest in the goods is than the determination of the one upon whom should fall the risk of loss. If the buyer really owns the goods and owes a debt for their purchase price, then the loss of the goods should fall upon him, just as much in the case where the seller has retained the title for security as where the owner of goods has given a mortgage thereon to secure a debt. If the parties meant that there should be no transference of any interest in the goods until the happening of some future event, then this is a pure sale dependent upon a condition, or a contract to sell, and the risk of loss remains in the seller. But since everything in a "conditional sale" looks to the present change of all ownership in the goods, if such is the intention of the parties, their intention should be given effect, and the mere fact of giving security for the debt created for the purchase price should not be used to defeat their actual intention to make a present sale, no matter what may later happen to the goods.

In general the courts have placed the burden of loss upon the buyer, who not only may lose the goods, but must still pay the price, for the debt was created and must be paid, and the loss of these particular goods is no different from the loss of any other goods that the buyer may possess which he has not paid for, and must be borne by him in the same way.[32]

[32] Tufts v. Griffin, 107 N. C. 47, 12 S. E. 68, LEADING ILLUSTRATIVE CASES.

Thus in Hollenberg Music Co. v. Barron,[33] in the sale of a piano the seller had retained title for security, such title to be given to the purchaser upon making full payments according to the contract, with a provision that upon failure to pay any three or more payments the whole purchase price was to be due. Under this agreement the seller had taken possession of the piano to secure payment of the balance due, and the piano was destroyed without his fault while so in his possession, yet it was held that this loss was upon the buyer, who was still compelled to pay the full purchase price. The case was treated so far as the loss was concerned just as if it had been one of actual chattel mortgage instead of conditional sale, where the mortgagee has taken possession of the property in order to enforce his claim. To thus place the risk of loss upon the buyer is according to the weight of American authority and has been stated in the Sales Act[34] as follows: "Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract, and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of delivery."

33. **Statutory provisions for recording.**—Whenever there arises a situation in which title is in one person while the actual property rights are in another, there is always great possibility for the com-

[33] 140 S. W. 582 (Ark.).
[34] § 22 (a).

mission of fraud unless some special provision is made for the protection of innocent parties. When there has been an out-and-out sale with an actual passing of title to the purchaser, if his general creditors should seek to seize such property in payment of their claims, the purchaser, by entering into collusion with the one from whom he had purchased, could defeat their rights by getting the seller to pretend that there was a conditional sale, and through this claim take the property into his possession and later return it to the purchaser. Such an agreement might easily be brought about if the seller had not yet been fully paid and no one might be able to disprove it, since such a bargain would be exclusively within the knowledge of the fraudulent parties.

But even when the conditional sale has been fairly and honestly made between buyer and seller, there is great danger of its being the means of injuring innocent parties in case the buyer, having full possession of the property and being apparently full owner thereof, should sell the same to an innocent third person who had no knowledge of the conditional sale. If the original seller still has the title for security he could enforce his rights against the new purchaser who would not only have paid the price to the first buyer, but would now be obliged to give up the property to the original seller in satisfaction of his claims against the goods.

Because of these and other possibilities of the conditional sale being used to the injury of innocent third persons, statutory provisions are to be found in most states requiring that unless such conditional

sales are made of record in some way, they will not be given effect as against such innocent third persons, though they may still be good as between the original parties to the agreement. The method of, and provisions for, such recording are usually similar to those that apply in the case of chattel mortgages, but in the absence of special statute on the subject, the mere provision for recording of chattel mortgages would not cover the case, for the conditional sale, though similar in effect to a chattel mortgage, is still a distinct and different thing, and is so treated by the courts.

CHAPTER VII.

BILLS OF LADING.

34. **Nature of bill of lading.**—When goods are shipped by the seller in compliance with an order from the buyer, title would ordinarily pass when the goods are put into the hands of the carrier for transportation if the buyer is to pay the freight, as is generally the case. But the seller may control and prevent such passing of title by taking from the carrier a bill of lading. This document consists not only of a statement of the goods received, but is also a contract by which the carrier agrees to deliver the goods to a certain person named, or to anyone whom he may order. Dependent upon the form in which the bill of lading is issued, it may be absolutely necessary to have possession of this bill in order to secure the goods from the carrier.

35. **Straight bill.**—The form in which the bill of lading is sometimes issued may amount to nothing more than a mere receipt for the goods, with, perhaps, added statements with reference to the contract of carriage, the carrier only agreeing to deliver to a named person. If by the bill the carrier undertakes merely to deliver the goods to John Smith, its full contract would be performed by making delivery to the particular person named, and it would not be necessary that the bill of lading in such a case should be given up, for the carrier

would have performed its full duty. When the bill of lading undertakes merely to deliver the goods to a named person, without stating that they will be delivered to him "or his order," it is called a "straight bill," and in effect is nothing more than a receipt for the goods. In such a case the person named gets the title to the goods when they are shipped to him and the obligation of the carrier so far as concerns the person to whom delivery is to be made is no different than if no document had been issued.

36. **Order bill.**—But the carrier, by issuing the bill in the form of a promise to deliver the goods to "John Smith or his order," assumes not only the simple duty of delivering to John Smith, but further undertakes to deliver to anyone whom John Smith may designate by indorsement on the bill of lading. Therefore the carrier would not be safe in delivering the goods without getting a surrender of the bill of lading, with the result that it is impossible to deal effectively with the goods while they are subject to such a bill of lading, without dealing with the bill itself. In other words we deal with the document which represents the goods rather than with the goods themselves. A bill of lading in this form is called an "order bill" or a "negotiable bill." The Sales Act[35] defines a negotiable document of title as "A document of title in which it is stated that the goods referred to therein will be delivered to the bearer or to the order of any person named in such document."

[35] § 27.

37. **A representative of title.**—By taking an order bill of lading the consignor is considered to have so definitely expressed his intentions with reference to controlling the title to the goods that it will outweigh any other acts on his part which might ordinarily show a different intention. Thus, if the seller takes the bill of lading to his own order, the title will still remain in him even though in the absence of taking such bill the title to the goods would have passed to the buyer upon delivery to the carrier. Since the carrier cannot safely deliver the goods without getting the surrender of an order bill of lading, business men have come to look upon the bill as representing the goods themselves, or the title to the goods, so that the only way in which the goods can be dealt with is through the bill of lading, so long as the goods are in the carrier's hands, subject to such bill. Therefore, if one should attempt to buy goods which are in the carrier's possession, he must know that they may be subject to such a bill of lading and that if this is the case he cannot get the title to the goods without getting the bill of lading, which by the act of the consignor of the goods was taken to represent the title while the goods are being carried.[36]

38. **Negotiability.**—When the bill of lading is in the form of an "order bill," it is usually spoken of as a negotiable bill, i. e., it may be transferred by the person described therein by indorsement upon it in the same manner in which bills of exchange

[36] First Nat. Bk. of Cairo v. Crocker, 111 Mass. 163, LEADING ILLUSTRATIVE CASES,

or promissory notes would be transferred. Such indorsement is treated, not as merely transferring the right to get the goods, but as actually transferring the goods themselves, since the bill now stands as the representative of the goods and the goods can be dealt with only by means of the bill.

39. **Extent of negotiability.**—There has been considerable difference of opinion as to the exact extent to which the idea of negotiability should be carried in the case of the order bill of lading. This difference has been not between the courts themselves in their interpretation of the effect to be given to negotiability in such a case, but between the courts, on the one hand, and the understanding and intention of business men on the other. It is the custom of business men to treat the bill of lading as if it were the goods themselves, and if one purchases a bill of lading, properly indorsed, to consider him as the owner of the goods. The courts, however, have not, in general, been willing to go the whole way and give full effect to negotiability, but have usually been willing only to admit that the bill might be transferred by indorsement, but that the possession of it would not give the holder power to transfer any better title than if he had possession of the goods themselves, which it represents. Thus, if one should get possession of goods, either through fraud or mistake, or by finding them, he would not be able to convey any better title than he himself had, and if he has no title, then he could convey none, and the courts have held that one getting possession of a negotiable bill of lading would

be limited in the same way.[37] The custom of merchants, on the other hand, is to treat the bill of lading not merely as representing the goods and transferable by indorsement, but to treat it as the title to the goods in such a way that anyone getting such bill and appearing to come within its terms as the person entitled to the goods may pass a good title thereto by transferring it to an innocent purchaser for value, just as he could in the case of a promissory note or other commercial paper. Thus, if a promissory note has been indorsed in blank, that is, so as to make it payable to anyone holding it, a holder of the note could pass a good title thereto to an innocent purchaser for value, even though he had been merely entrusted with possession, or even if he had secured possession by some wrongful act. Business men, in dealing with order bills of lading, treat them in this way, that is, as representing title rather than as a mere symbol of the goods.

40. **Legislation with reference to negotiability.** —Since the view of the court fixes the rights, regardless of what business men may wish or intend, the result has been statutory provisions in many states, declaring the full negotiability of such bills of lading. Such provisions are contained in the Uniform Bills of Lading Act,[38] which provides that "A negotiable bill may be negotiated by any person in possession of the same, however such possession may have been acquired," thus including even a finder or a thief among persons who could pass good

[37] Stollenwerck v. Thacher, 115 Mass. 224, LEADING ILLUSTRATIVE CASES.
[38] § 31.

title to an innocent purchaser as in the case of bills and notes. The Sales Act,[39] as generally adopted, does not go quite so far, but provides for the passing of the title "By any person to whom the possession or custody of the document had been entrusted by the owner." Some states, however, in passing the Sales Act have followed the provisions of the Bills of Lading Act on this point. There is legislation declaring bills of lading negotiable in other states which have not as yet adopted either the Uniform Bills of Lading Act or the Uniform Sales Act. The result is that most courts, in the absence of this or similar legislation, would not give any greater effect upon property rights in the goods through a dealing with the bill of lading, than would be allowed if the parties had been dealing directly with the goods themselves, and recognize negotiability only to the extent of saying that the holder of goods may transfer whatever right he has to them by the indorsement of the bill of lading.

41. **Risk of loss—Bill of lading in buyer's name.**—When the seller takes out the bill of lading in the buyer's name, it is clear that the title at once passes to the buyer and the risk of loss is upon him. This is true even though the seller, after getting such a bill of lading, retains possession thereof to secure the payment of the purchase price, such retention of possession amounting to nothing more than a lien which will prevent the buyer from getting actual possession of the goods until such bill is surrendered by the seller, who may retain it

[39] § 32.

until he receives payment for the goods which it represents.

42. **Same subject—Bill of lading in seller's name.**—When the bill is taken by the seller in his own name, though he thereby retains title, his intention may be the same as in a case of conditional sale, that is, though he intends to pass the property right in the goods, he wishes to retain the title in himself for security until payment for the goods has been made. Some courts have given effect to this intention of the seller and have placed the risk of loss as they have done in the case of conditional sale, that is, upon the buyer who has the actual property right in the goods, even though the bare legal title has been retained by the seller for his security. Other courts have refused to recognize any property right in the buyer unless the bill of lading is actually made out in his name or properly indorsed over to him. The Sales Act[40] and the Uniform Bills of Lading Act[41] have adopted the security title idea, if this is what the seller intended in taking the bill in his own name. In each act it is provided that "if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract."

43. **When bill of lading does not represent the goods—Consignor having no title.**—One cannot get

[40] § 20 (2).
[41] § 40 (b).

any right or title to goods which he does not own by giving them to a carrier and taking a bill of lading therefor. Thus, if A steals the goods of B, and ships them to another place, taking a bill of lading for them to his own order, even though he should sell such bill to an innocent purchaser for value, such purchaser would get nothing, for the bill represents nothing, since it was never properly issued and never represented any goods of the consignor. Such a purchaser can look only to the one from whom he purchased for satisfaction. This is an entirely different situation from that of wrongfully selling a bill which has been properly issued.

44. **Same subject—Goods never received by carrier.**—An even clearer case in which the bill of lading gives no right in any property to a purchaser, is where the carrier has issued such bill without ever having received the goods which it purports to represent. Clearly it is not a representative of any goods, and never has been. But in such a case the carrier would be liable for having wrongfully issued such a bill, by reason of purchasing which, the buyer has suffered a loss; and in many states the carrier is, by statute, declared to be guilty of a criminal offense in so doing, and it is so provided by the Uniform Bills of Lading Act.[42]

45. **Same subject—Goods no longer in carrier's possession.**—Even though the bill of lading was originally effective, it remains so only so long as the goods remain in the carrier's possession, and if the goods have been delivered to the person who

[42] § 44.

is actually entitled by the bill to receive the same, any later transfer of the bill of lading will pass no rights. The bill is a "spent bill," and by the delivery of the goods out of the carrier's possession it has lost all force and effect. Though the purchaser in such a case would not get the goods, still he would have a right of action against the carrier for his loss, for it was its duty to deliver the goods only on the surrender of the bill of lading, and the failure to do so has caused the injury to the innocent buyer, an injury which the carrier must have foreseen as possible and for which it should, therefore, be liable.

46. **Warehouse receipts.**—Where goods are stored in a warehouse and receipts issued therefor it is customary to deal with these receipts as representatives of the goods themselves somewhat as in the case of bills of lading, though most courts have refused to go as far in recognizing them as documents of title as in the case of bills of lading. This question also has been largely covered by statute in many states, and in the Uniform Warehouse Receipts Act[43] such documents, where goods are deliverable "to the order" of the person named, are declared to be negotiable, and by their negotiation and transfer the property right in the goods themselves is passed, though this act, as originally drawn up, does not provide for negotiation by "any person in possession," but only by one "to whom the possession or custody of the receipt has been entrusted by the owner."

[43] § 40.

CHAPTER VIII.

VENDOR'S LIEN.

47. **Nature of the right.**—The vendor's lien is the right which the seller has to retain possession of the goods after title has passed, until he receives payment of the purchase price. Unless there is some special agreement to the contrary this right may always be exercised by the vendor.

There must have been an actual sale of the goods with a passing of the title thereto in order that the case be a proper one for the application of the vendor's lien. The whole idea of it is that the seller is retaining the possession of the goods which now belong to the buyer as security for the purchase price. If the seller has provided for security in any other way, the principle of vendor's lien is not applicable.

48. **For purchase price only.**—This lien is given by the law and does not depend upon any agreement of the parties and always exists unless the parties have made some special agreement inconsistent with it. It does not cover any claim other than that for the actual purchase price due for the particular article which has been sold and which is being held under this lien as security therefor. Thus, if A sells a horse to B for $200, B paying $100 cash, but without credit being extended for the remaining $100, A may retain the horse until this

$100 is paid, but he cannot hold him for any other debts which may be owing to him by B. Neither can the goods be held for any charge which the seller might claim for holding and caring for them while attempting to enforce his rights under the lien. Thus, in the case above stated, if A has retained the horse for the purpose of securing the payment of the price, he cannot claim anything for the expenses of so keeping him. The law gave the seller the right to hold the property under his vendor's lien, but he was not required to do so; therefore, if he decides to hold under his lien he must bear the expense of so doing. "No person has, by law, a right to add to his lien upon a chattel a charge for keeping it till the debt is paid; that is, in truth, a charge for keeping it for his own benefit, not for the benefit of the person whose chattel is in his possession."[44]

49. **Dependent upon possession.**—The fundamental idea in vendor's lien is possession. If the seller has once voluntarily parted with possession, without being induced to do so by fraud, his lien is gone and he will have to seek payment of the purchase money due him like any other creditor, and he cannot revive the lien in any way. Of course the buyer may voluntarily surrender to the seller for security the property purchased if the rights of other parties are not thereby injured, but this is not strictly a vendor's lien, for the buyer was under no obligation to do so, and might have given any other property he possessed as such security

[44] Somes v. British Empire Shipping Co., 8 H. L. C. 338 (Eng.).

for the debt which he owed for the purchase price. The surrender of possession by the seller amounts to a waiver of his lien even though payment is not made as expected by the seller.

50. **Goods in buyer's possession at time of sale.**—If at the time that the sale is completed the goods are already in the buyer's possession, the seller has no lien on them, since the situation is now the same as in the case where the seller has actually delivered over the possession after the sale has been completed. But if the goods are in the hands of some third person at the time of the sale, such person continues to hold as he has been holding, i. e., for the seller, and consequently the seller's lien continues until there has been some new agreement entered into that such bailee shall now hold the goods for the buyer.

51. **Partial delivery.**—Each part of the goods may be held under the vendor's lien as security for the whole purchase price or any proportion thereof remaining unpaid. Thus, if one-half of the purchase price remains unpaid, the seller may retain all the goods as security therefor, or he may deliver all but a small fraction, and then hold that amount under his lien to enforce payment of the whole or whatever portion of the purchase price remains unpaid.

52. **Agreements inconsistent with lien.**—The vendor's lien may be exercised only when the seller is entitled to demand payment of the price before giving up his possession of the goods. Therefore, any agreement to give credit to the buyer contem-

plates that payment is to be deferred, and that the buyer is to be given possession of the goods before making payment of the price. If A sells goods to B, giving him thirty days within which to pay for the same, B is entitled to secure possession of the goods at once and A has no right to refuse delivery until the period of credit has expired and payment is made. If A refused to give up possession in such a case B could take the goods from him by legal process.

The effect of a bargain giving credit to the buyer for the payment of the purchase price is in effect an agreement to waive the vendor's lien and the seller cannot hold the goods except under certain special circumstances[45] which will be mentioned later.

53. **Resale by buyer.**—If the buyer resells the goods to another, and the seller agrees to hold them for the latter, this amounts to a waiver of the vendor's lien, for such lien exists only against the original vendee, and if vendee agree to hold for a sub-vendee, the result is the same as an actual delivery to the buyer and a re-storing of the goods by the sub-purchaser with the original seller. So, a delivery of a part of the goods to such sub-purchaser amounts to a recognition of his right in the goods and shows an intention no longer to retain the goods under the vendor's lien. The new purchaser is not indebted to the original seller, and having recognized the new purchaser as entitled to the goods, the seller cannot later change his mind and withhold them. The new purchaser owes him no

[45] Arnold v. Delano, 4 Cush. 33 (Mass.), LEADING ILLUSTRATIVE CASES.

debt, and by recognizing a right in the new purchaser he has waived his right as against the original buyer. The recognition of the sub-purchaser as owner is equivalent to an actual delivery of the goods.

54. **Revival of lien.**—If the seller has once voluntarily given up possession of the goods, in the absence of any fraud on the part of the buyer, his lien is gone. This is true even though the buyer cannot pay for the goods. The seller's claim for the purchase price is now on no different basis than the claim of any unsecured creditor, and the particular goods which he has sold to the buyer are the buyer's goods as much as any other property he may have and hence are subject to any of his debts, and the debt for the purchase price will be given no preference.

But even though the seller may have waived his lien by giving credit to the buyer for the purchase price or making any other agreement inconsistent with the vendor's lien, so long as it does not amount to a delivery of the goods, the lien will be revived if the buyer should become insolvent while the goods are still held by the seller for the buyer. It is said that the credit is given on condition that the buyer keep his credit good.[46] So also, if the seller, even though having given a certain period of credit, is still left in possession of the goods, when the period of credit expires, the lien will immediately revive, and this is true regardless of the solvency or

[46] McElwee v. Metropolitan Lumber Co., 37 U. S. App. 266, 16 C. C. A. 232, 69 Fed. 302.

insolvency of the buyer. The important thing to be borne in mind with reference to the revival of the lien in case of insolvency or expiration of credit, is that the seller is still in possession of the goods, holding them for the buyer.

55. **Termination of lien.**—The buyer may terminate the vendor's lien by making tender of the amount due. If the seller then improperly refuses to receive payment he may nevertheless be compelled to surrender the goods, for his only right was to hold them to enforce payment, and if payment has been offered, it shows that he is not holding them for that purpose, and any other detention of the goods is wrongful. The buyer could then bring replevin for the goods in order to secure the possession.

56. **Possession secured by fraud or theft.**—If the buyer has secured possession of the goods by practicing some fraud on the seller to induce him to surrender possession, as by representing that he wants them for some special and temporary purpose and then refusing to return them, as between the buyer and the seller the lien is not lost, but the seller can recover the possession of the goods and thus revest his lien. The seller has the right of possession in such case and can enforce his rights by legal process. But if the buyer, having thus obtained possession by fraud, should sell the goods to an innocent purchaser for value without notice of the fraud, such purchaser would get a perfect right to the goods as against the original seller, for the lien being dependent upon possession, if the pos-

session is given up even though this was induced by fraud, the buyer, having title, can pass a complete property right to an innocent purchaser, just as one who has obtained the title to goods by fraud can, nevertheless, pass a perfect title to an innocent buyer.

But if the seller has not voluntarily given up possession but possession has been taken from him wrongfully by the buyer, as by theft, it would seem that the vendor's rights are not divested, and even an innocent purchaser from the buyer would not get the property free from the lien, and would in fact get no greater right than his immediate vendor had. That is, though he would get title, he would not be entitled to possession, and the original seller might recover the possession just as he might have recovered it under such circumstances from the original vendee.

57. **Enforcement of lien.**—With ordinary liens generally the only right is to retain possession to enforce payment, with possibly the right, upon failure to pay, to secure a foreclosure of the buyer's rights in the property, but other than this the seller can do nothing to realize upon his security. "The vendor's right to the property is often called a lien, but it is greater than a lien. In the absence of an express power the lienor usually cannot transfer the title to the property on which the lien exists by a sale of it to one having notice of the extent of his right, but he must proceed by foreclosure. When a vendor rightfully * * * retains them (the goods) * * * he can, by a sale made on notice

to the vendee, vest a purchaser with a good title. His right is very nearly that of a pledgee, with power to sell at private sale in case of default."[47] The Sales Act[48] has stated very concisely the general rules with reference to the rights of the unpaid seller against the goods as they have been developed and generally recognized by the courts.

[47] Tuthill v. Skidmore, 124 N. Y. 148.
[48] §§ 53, 54, 55, 56.

CHAPTER IX.

STOPPAGE IN TRANSITU.

58. **Nature of right.**—Stoppage in transitu refers to the right which is given an unpaid seller to stop goods which are in the hands of a carrier in process of transportation from the seller to the buyer, when the buyer becomes insolvent. It refers always to a case where the title has already passed by reason of the shipment, but the goods have not yet reached the buyer and are still being held by the carrier under the original direction given to it by the seller. The effect of stoppage in transitu is practically the same as if the vendor were allowed to revest himself with his vendor's lien, and it has sometimes been spoken of as an extension of the vendor's lien. But it is a right separate and distinct from vendor's lien, as is shown by the fact that it differs in two very material respects, first, in that it is exercised only after the vendor has parted with possession, and second, its exercise is dependent entirely upon the insolvency of the buyer. It is true, however, that after its exercise, the vendor is placed in practically the same situation as if he was holding the property under an actual vendor's lien. The situation is thus summed up in the Sales Act:[49] "When the buyer

[49] § 57.

of goods is or becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods at any time while they are in transit, and he then becomes entitled to the same rights in regard to the goods as he would have had if he had never parted with the possession."

59. **How exercised.**—The right is exercised by notice being given to the carrier to stop the goods and withhold delivery. This notice may be given to any proper agent of the carrier, and such agent must use due diligence to see that such notice will be forwarded to the agent who has the custody of the goods. "To make a notice effective as a stoppage in transitu, it must be given to the person who has the immediate custody of the goods; or, if given to the principal, whose servant has the custody, it must be given * * * at such a time, and under such circumstances, that the principal, by the exercise of reasonable diligence, may communicate it to his servant in time to prevent the delivery to the consignee."[50] If, after proper notice received, the carrier should nevertheless deliver the goods to the consignee, the carrier would be liable to the consignor for conversion of the goods.

60. **Insolvency of buyer.**—One absolute requirement, in order that the seller may exercise this right, is the insolvency of the buyer. Without such a showing the vendor's acts would be improper and he could keep no hold on the goods since he has lost

[50] Whitehead v. Anderson, 9 M. & W. 518 (Eng.).

his strict vendor's lien by giving up possession. In order to show insolvency such as to entitle the seller to exercise this right, it is only necessary to show that the buyer is not meeting his obligations as they come due, and it is not necessary to show that there has been any judicial declaration of such condition. Thus it may happen that a buyer's assets may be much greater than his liabilities, yet if he has failed to pay his debts as they have matured, the seller is justified in treating him as insolvent and may stop goods. But if, as a matter of fact, the buyer's liabilities do exceed his assets, even though he has met his obligations as they matured, yet in such a case the buyer is actually insolvent, and the seller is entitled to stop the goods. "It is sufficient, if, before the stoppage in transitu, he was either in fact insolvent, or had, by his conduct in business, afforded the ordinary, apparent evidences of insolvency."[51] How great the insolvency may be is not material, but the right may be exercised if the buyer is insolvent at all. But there must be actual insolvency or evidences of insolvency at the time the goods are stopped or before the goods arrive. If the seller knew of the buyer's condition, but nevertheless shipped the goods, then he has waived his right and will not be allowed later to change his mind and attempt to exercise it, but even though the buyer was insolvent when the goods were shipped, the seller may stop them if he did not know of the insolvency before the goods were sent.[52]

[51] Diem v. Koblitz, 49 Ohio St. 41, 29 N. E. 1124.

[52] Loeb & Bro. v. Peters & Bro., 63 Ala. 243, LEADING ILLUSTRATIVE CASES.

61. **Goods subject to negotiable bill of lading.**—If the seller has had a negotiable bill of lading issued for the goods and such bill of lading is outstanding, the seller's right to stop the goods in transitu will be subordinate to the right of anyone who purchases such bill of lading in good faith and for value, and it would seem that it should make no difference whether such transfer of the bill of lading took place before or after the notice of stoppage in transitu was served, for the seller should be estopped from setting up any claim to the goods as against an innocent purchaser of the bill of lading which the seller has caused to be issued and on which he must know that an innocent purchaser will rely and upon which he will advance his money. This was the view held in Newhall v. Cent. Pac. R. R. Co.,[53] and this view has been adopted in the Sales of Goods Act.[54]

62. **Stopping proceeds of the goods.**—Though some English cases have allowed the seller to stop the proceeds of the goods when the seller has taken a negotiable bill of lading, which he has pledged as a security for a loan, as in a case where a bank has advanced the price of the goods to the seller on the security of the bill of lading, and has allowed the seller to secure whatever surplus of proceeds had remained after satisfying the claims for the loan made by the bank holding the bill of lading for security, no American cases seem to have taken this view. The attitude of the American cases is that if the seller has put himself in such a position

[53] 51 Cal. 345.
[54] § 59 (2).

that he cannot stop the goods themselves, then his entire right is gone and he cannot get any security from the goods or their proceeds.

63. **When transit begins.**—The transit is considered to have begun as soon as the goods have been taken in charge by the carrier for the purpose of transportation. Before such time, if the title has passed, the goods are subject to the vendor's lien and may be stopped while on the way to the carrier under such lien, as the person who has them in charge is acting strictly for the vendor and hence the goods are still in the vendor's possession. If, as is the usual case, the title is not to pass until the goods are given into the charge of the carrier, then no question of either vendor's lien or stoppage in transitu is involved, since the goods are still the vendor's goods and he may prevent title from passing at all if he wishes. In order that the transit be considered to have begun so that the right of stoppage in transitu may be properly exercised, the goods must have left the seller's possession, and must be in the hands of some one standing between the seller and the buyer who does not directly represent either party but holds the goods only for the purpose of transporting them according to the original direction given to the goods by the seller.

64. **In whose hands goods may be stopped.**—Though the usual case where the right of stoppage in transitu is exercised is where goods are in the hands of a common carrier, still it is not essential that they be in the hands of one who occupies exactly this position. It is only necessary that the

party in possession be a step in the course of effecting the delivery from the seller to the buyer, in such a way that he is not acting solely for the one or the other of the parties but stands intermediate between them so that his possession cannot strictly be considered to be that of the seller or that of the buyer. Such third person may "be a carrier, a warehousekeeper, a wharfinger, packer or other depositary, or an agent for the purpose of forwarding."[55]

The time when transit of the goods begins is stated in the Sales Act[56] as follows: "From the time when they are delivered to a carrier by land or water, or other bailee for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee."

It may not be necessary theoretically that this third person in possession of the goods be a public service company, for it may be any "other bailee for the purpose of transmission to the buyer," but practically it is very exceptional to find a case where the third person is not a public service company unless it be a case where the third person represents one party or the other in such a way that his possession would not be considered as the possession of an agent for one party or the other. The possession must be held as a step in the transit, and not purely as being vested in an ordinary bailee for either party.

[55] Harris v. Pratt, 17 N. Y. 249.
[56] § 58 (1) (a).

65. **Who may exercise the right.**—The right is given only to the seller or one acting for him as his agent with power to do such act, for the right is in the nature of an extension of the vendor's lien, given expressly for the purpose of protecting the seller by aiding him in getting the price. Thus, a creditor of the vendor cannot exercise the right, and this is true even if the debt was created by the sale of the very same goods to the consignor. One who stands practically in the situation of vendor with reference to the goods may, however, exercise the right even though he may not strictly be considered as vendor, as in the case of an agent who buys goods for his principal, advancing the money therefor, and ships them to him. He may in such a case stop the goods since his position is exactly the same as that of an unpaid vendor.

66. **When transit ends.**—When the goods come into the hands of the buyer, or someone acting directly for him in receiving them, or if the buyer has given some new direction to the goods and they are now going forward under such direction, the original transit started by the seller is at an end.[57] Any exercise of control or direction on the part of the buyer, or his securing the carrier or warehouseman to hold the goods for him, ends the transit.

When the goods have arrived at their destination the transit is not ended so long as they are in the hands of the carrier or other bailee, awaiting the buyer, and the fact that the liability of the carrier may have changed from the strict liability as a car-

[57] Becker v. Hallgarten, 86 N. Y. 167, LEADING ILLUSTRATIVE CASES.

rier to that of a warehouseman, because the goods have arrived at their destination, does not affect the case so long as the buyer has not received the actual possession. Nor does it make any difference how long they are so held by the carrier. The transit is considered to still continue until the goods actually come into the control of the buyer. But, if after the goods have arrived at their destination, the buyer enters into some new arrangement with the carrier or warehouseman, that he shall now hold the goods for the buyer, such arrangement ends the transit and therefore ends the seller's right to stop the goods.[58] The statement of the law as given in the Sales Act[59] is as follows: "Goods are no longer in transit * * * if, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent; and it is immaterial that a further destination for the goods may have been indicated by the buyer."

67. **Delivery by truckman or by express company.**—When the transit ends will depend upon the undertaking made with reference to the carriage of the goods. The obligation assumed by a railway company is ordinarily to carry to its station, and hence, after the goods are taken from its depot the original transit is ended even though the goods are still in the hands of some truckman in course of

[58] Jeffris v. Fitchburg R. Co., 93 Wis. 250, 67 N. W. 424.
[59] § 58 (2) (b).

delivery to the address of the buyer. Such truckman represents the buyer and his possession is to be considered either as the possession of the buyer, or as a new direction given to the goods by the buyer, in either of which cases the original transit is ended. Nor is it necessary, in order to maintain this rule, that the buyer has given new directions as to the handling or carrying of these particular goods; it is sufficient if the buyer has given general directions to the truckman to take from the station and deliver to him any freight which may arrive. The truckman is not a final step in the original transit, for the obligation of the carrier is to carry only to its station, and the truckman acts only at the direction of the buyer.

But if the carrier undertakes to actually deliver to the buyer in person, as is generally the case with express shipments, then the transit continues even after the goods are transferred to the carrier's vehicle for delivery to the buyer's residence or place of business, and if they can be stopped before actually so delivered, the seller's right of stoppage would still be effective. Thus, even after an express package has been placed on the express wagon for actual delivery to the buyer, it is still in transit under the original impetus given to it by the directions of the seller; while goods sent by freight, when they are put upon the wagon of a truckman, are treated as already in the buyer's possession so that the transit is ended.

68. **New direction given to goods.**—The right of stoppage in transitu ends as soon as the goods have

received some new direction from the buyer and are going forward in consequence of such new direction. Thus, if A in Chicago receives an order from B of Liverpool for ten thousand bushels of wheat with directions to ship the same to C in New York, who is to forward according to B's directions, after the goods have been received and redirected by C the original impetus given to the goods by the original directions given by the seller is over, and the goods are now on a new transit and hence cannot now be stopped by A.

69. **Goods intercepted by buyer.**—The seller has no right to have the goods carried to the particular destination which he has named, for there is nothing which entitles him to have the transit proceed in such a way that he will have the opportunity to stop the goods, but the right is merely a privilege granted to him if he can exercise it before the buyer gets control of the goods. If goods are sent by the seller from point A to point C, but are intercepted by the buyer at the intermediate station B, the seller cannot complain, and it makes no difference that, if the goods had gone through the whole transit as originally directed, he would have been able to stop them. The only obligation of the railway company was to deliver the goods to the buyer and this they have done, and there was nothing improper in making such delivery at station B rather than at station C. The law gives to the seller the right to stop the goods if he can exercise it before the goods get into the hands of the buyer, but if delivery to the buyer has been made before the seller expected that it

would be, still no legal right of the seller has been violated either by the buyer or the carrier, and the seller has no redress. This situation is provided for in the Sales Act[60] in the following terms: "Goods are no longer in transit * * * if the buyer, or his agent in that behalf, obtains delivery of the goods before their arrival at the appointed destination."

But to defeat the seller's right to stop the goods, some actual control must be exercised by the buyer over the goods themselves. Hence, a mere sale of the goods by the consignee while they are in transit will not affect the seller's right, for the buyer buys subject to the possible exercise of the seller's right of stoppage in transitu, unless he takes under a negotiable bill of lading,[61] just as one who buys goods which are still in the seller's possession, takes them subject to the seller's right to exercise his vendor's lien. The Sales Act[62] states the generally recognized law as follows: "The unpaid seller's right of lien or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto."

The Sales Act further states: "If, however, a negotiable document of title has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the right of any purchaser for value in good faith to whom such document has been negotiated, whether such negotiation be prior or subse-

[60] § 58 (2) (a).
[61] See Chap. VII, § 39.
[62] § 62.

quent to the notification to the carrier, or other bailee who issued such document, of the seller's claim to a lien or right of stoppage in transitu." This latter situation has not been passed upon, it seems, except in one case,[63] but the Sales Act adopts the view which was there decided.

Nor will the seller's rights be defeated by the action of the buyer's creditors in seeking to attach the goods and make them subject to their claims. In such case, their rights are subject to the prior rights of the seller to stop in transit and thus get a special security for his claim. The whole idea of the right of stoppage in transitu is to give a special protection to the seller and this he would be deprived of if his right might be cut off by others who should have no special claim upon these goods different from that which they might acquire with reference to any other goods of their debtor. It would not be reasonable to take away this right from the seller at the time when he needs it, and thus deprive him of what it was intended that he should have, a special hold on these particular goods to secure the purchase price due for them.

[63] Newhall v. Central Pac. R. R. Co., 51 Cal. 345.

CHAPTER X.

SELLER'S RIGHTS AFTER STOPPAGE IN TRANSITU.

70. **Compared to rights under vendor's lien.**—After stopping the goods the seller's rights are much the same as in the case of the vendor holding under his vendor's lien. "It seems to be well settled, that when the right of stoppage in transitu is properly exercised, the effect is to restore the vendor to precisely the same position as if the goods had never left his possession. He has the same rights with respect to the property and they may be enforced in the same way."[64] The exercise of this right does not in any way rescind the sale, and until some further act is done other than to merely stop the goods, no change whatever in the situations of buyer and seller with reference to the goods takes place. Therefore, before the seller takes any further steps, the buyer or some one acting for him, or standing in his place, as assignee in insolvency, or for the benefit of creditors, may by offering the amount due secure possession of the goods. After the seller has stopped the goods, if the buyer does not redeem them within a reasonable time by paying the purchase price, the seller has his choice of any one of three remedies in order to secure the payment of his claim, the same remedies which an unpaid seller would

[64] Diem v. Koblitz, 49 Ohio St. 41, 29 N. E. 1124.

have under his vendor's lien. These remedies are stated in Dustan v. McAndrew[65] as follows: "The vendor of personal property in a suit against the vendee for not taking and paying for the property has the choice ordinarily of either one of three methods to indemnify himself: (1) He may store or retain the property for the vendee, and sue him for the entire purchase price; (2) he may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or (3) he may keep the property as his own, and recover the difference between the market price, at the time and place of delivery, and the contract price."

71. **Holding the goods and suing for price.**—While in the case of the vendor's lien, the vendor may often prefer to bring his action at law for the purchase price, holding the goods as security for the judgment obtained, the seller who has stopped the goods in transit would not ordinarily care to pursue this remedy since the buyer must always be insolvent when this right is exercised, and hence a judgment against the buyer for the purchase price would never be worth the amount of the purchase price and the seller would in consequence have no advantage by reason of his position.

72. **Resale by seller.**—There is never a case for the application of vendor's lien or stoppage in transitu unless title has passed to the buyer. Nevertheless, when goods are so held by the unpaid seller he

[65] 44 N. Y. 72.

may resell the same and pass a good title to the purchaser. In giving this right of resale, the law has gone very far beyond the remedy given in the case of other common law liens, where the only right is to hold possession in order to enforce payment, with perhaps the added right to have a proceeding similar to a foreclosure for the purpose of finally realizing on the security if the buyer fails or refuses to make payment.

73. **When right of resale arises.**—The seller cannot stop the goods and immediately resell them, for the vendee, or those representing him, are entitled to the goods and all that the seller can ask for is that he receive the purchase price. Therefore the goods must be held for a reasonable time, so as to give the buyer an opportunity to act. As to what constitutes a reasonable time must depend upon the situation in the particular case. This will no doubt be affected by the character and condition of the goods and their liability to deterioration, and by the conditions of the market. The Sales Act[66] has stated the law on this point as generally recognized as follows: "Where the goods are of a perishable nature, * * * or where the buyer has been in default in the payment of the price an unreasonable time, an unpaid seller having a right of lien or having stopped the goods in transitu may resell the goods."

It is sometimes said that the seller must hold until the period of credit has expired, but this limitation seems unreasonable if applied strictly in all cases and it is generally considered that one of the condi-

[66] § 60 (1).

tions of giving credit is that the buyer should keep his credit good. If the period of credit is short and the goods are such as not to be materially affected by delay, these are facts of importance in determining what is a reasonable time to wait in the particular case.

So also the condition of the buyer and the nature of his default will be material. If he is very badly involved so that there is but little likelihood of his being able to redeem the goods or if he has shown that he does not intend to redeem them, the seller may sell whether the period of credit has or has not expired. It does not seem, therefore, that the seller is bound to wait until the period of credit has expired but merely that he hold the goods, giving the buyer a reasonable time within which to redeem, and that what is a reasonable time will depend not only upon the character of the goods but also upon the condition of the buyer and the terms of the contract between the parties. The seller cannot deprive the buyer of the right to get the goods merely because the buyer is in some way in default, either by reason of delay in making payment or because of temporary insolvency, but he can resell only as it is necessary in order properly to save himself from loss because of the buyer's inability to pay.

74. **Notice of resale.**—Though some jurisdictions have required that notice of resale be given to the buyer, most courts have not required such notice, but the right to resell is considered to be a right which the buyer must know the seller has and may exercise if he does not redeem the goods within a

reasonable time. The Sales Act[67] has adopted the rule followed by the majority of courts, namely, that notice is not necessary: "It is not essential to the validity of a resale that notice of an intention to resell the goods be given by the seller to the original buyer. But * * * the giving or failure to give such notice shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before resale was made. It is not essential to the validity of a resale that notice of the time and place of such resale should be given by the seller to the original buyer. The seller is bound to exercise reasonable care and judgment in making a resale, and subject to this requirement may make a resale either by public or private sale."

75. **Loss or profit on resale.**—The exercise of the right of resale does not limit the seller to the amount only which is realized on such resale, but if the goods do not bring enough to pay the purchase price due for the goods, the seller will also have a claim against the buyer for the deficiency, and may charge to the buyer the costs and expenses of such resale.

If, however, the sale of the goods results in a profit over the purchase price due, such profit goes to the seller also. This does not seem entirely logical but is, nevertheless, the rule generally followed. The buyer has had his right to redeem the goods and thus secure any profit which might have been made, but having failed to do so, he has thrust upon the seller the burden of realizing a fair price and the possible necessity of bringing action to recover dam-

[67] § 60 (3) (4) (5).

ages, and therefore is in no position to claim anything for his own benefit if a profit should result from the resale. By failing to redeem, the buyer does not relieve himself from liability, but he does waive any right to any profit which may result from the activities of the seller. The seller is not allowed to charge for his own services in making a resale, but, on the other hand, the buyer who has refused to pay the price or to take the goods and realize what he can on them, ought not to be allowed to profit by the sale which he has forced the seller to make, since the seller is to receive no payment for his labor nor for the bother and trouble to which he has been subjected.

The right of the seller to place any loss because of the breach of contract upon the buyer, and to keep for himself any profit which may result, has been adopted in the Sales Act.[68] It is there provided that if the resale has been properly made by the seller, "He shall not thereafter be liable to the original buyer upon the contract to sell or for any profit made by such resale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale."

76. **Resale as agent for the buyer.**—It is generally stated that in making the resale the seller is acting as the agent of the buyer, but this statement must be taken in a very qualified and limited sense. It is clear that the seller has received no special authorization from the buyer, but in fact he still has this right to resell, even though the buyer directly ob-

[68] § 60 (1).

jects to its exercise. Further, he is not acting for the benefit of the buyer but, rather, strictly for his own interest, with the qualification that in so doing he must protect the interests of the buyer and "is bound to exercise reasonable care and judgment in making a resale."[69] The object sought in calling him the agent of the buyer under such circumstances is, perhaps, to make clear the fact that he could pass a good title to a purchaser at such resale, and also to show that he has not meant to merely take the goods in satisfaction of the debt but that he is selling them to realize whatever he can and to place such amount to the buyer's account upon the purchase price. But this is using the word "agent" in a sense much different from its ordinary meaning. It is the law which makes the seller the "agent" in such cases and he does not in fact represent the buyer in any way, but acts only under the powers and for the purposes which the law allows.

77. **Keeping property as his own.**—In order to secure the purchase price, it is not necessary that the seller resell, but he may keep the property as his own, allowing its fair value upon the purchase price and bringing action for the difference, if there is any, between such present value and the contract price. But since the vendor's lien is a right to hold the goods and does not of itself show any intention to rescind the sale, it is not presumed that the seller has taken the title back unless he has done some act to indicate such an intention. Any act showing a dealing with the goods in a way inconsistent with

[69] Sales Act, § 60 (5).

merely retaining possession for security would show such intention in the absence of an express declaration of election to do so.

If the seller is allowed to keep any profit which may be realized on a resale, there seems no reason why he should not be allowed to take over the goods themselves and keep them as his own if he desires to do so. Certainly the buyer is in no position to object, since by reason of having failed to redeem the goods, he cannot now be benefited by them under any circumstances, and all he can ask is that he be credited with their fair value.

CHAPTER XI.

C. O. D. SALES.

78. **Meaning of term.**—C. O. D. or collect on delivery refers to the method of shipment employed, principally by express companies, wherein the carrier agrees not only to carry, but also to collect the purchase price of the goods from the buyer and remit the same to the shipper. This method of shipping protects the seller in that he does not give up his hold on the goods until payment is actually made, and on the other hand, the buyer does not need to give up his money until the goods are actually given into his possession. If the parties so agree the buyer may also inspect the goods before parting with his money, but in the absence of agreement to this effect, it is the custom of the express companies to refuse to allow such inspection.

79. **When title passes—Delivery to carrier.**—The question as to when title passes in such sales is one on which the courts are divided; some taking the view that title passes when the goods are delivered to the carrier, while others hold that no title passes until the actual delivery of the goods to the buyer. The first view is the one usually considered to be the better view. It is based on the idea that there is nothing different in such a case from the ordinary question of passing of title when goods are delivered to the carrier by the seller in response to an order

from the buyer. If the parties intend in the ordinary case that title shall pass on delivery to the carrier there would seem to be nothing in the added duty which the carrier has assumed of collecting and remitting the purchase price, which indicates a different intention. The Sales Act[70] has adopted this view after stating the presumption that title passes in the ordinary case where goods are given to the carrier for transportation. It says: "This presumption is applicable, although by the terms of the contract the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words 'collect on delivery' or their equivalents." Courts holding the first view say that the carrier has merely taken the obligations of a collecting agent in addition to its usual duties of transportation.

If title passes when goods are delivered to the express company, then the buyer may pass a good title to an innocent purchaser, if he can secure possession, whether he has made payment or not. If A in response to B's order sends a buggy to B, "C. O. D.," and B secures possession without making payment, and sells it to C, an innocent purchaser, B, having a good title, therefore passed a good title to C and C can hold the goods as against A and is not required to pay A the purchase price or give up the goods to him.[71] A's only remedy in such case would be to look to B for the price, or hold the carrier liable for having improperly delivered the goods.

[70] § 19, rule 4 (2).

[71] Norfolk South. Rr. Co. v. Barnes, 104 N. C. 25, LEADING ILLUSTRATIVE CASES.

80. **Same subject—Payment of the price.**—The courts holding the second view maintain that by shipping the goods "C.O.D." the seller does not mean merely to retain a hold on them to secure payment, but that it is not the intention of the parties that title shall pass until actual payment of the price is made. This is treating the case much as if it were a sale over the counter, or a sale conditioned to become effective only on payment of cash. The argument against this is that in employing the carrier to collect the price there is nothing to show that the seller has not intended title to pass, and that it would be presumed to have passed except for the C. O. D. provision, and that this alone does not negative that presumption but merely amounts to a retention by the seller of the possession, much in the nature of a vendor's lien for securing payment of the price.

In most of the cases which have maintained this view, the subject matter of the sale was intoxicating liquors or other articles, the sale of which was prohibited within the jurisdiction and which were sent into the state under C. O. D. shipment. The policy of the state being against such goods, the tendency undoubtedly in many cases has been to treat title as passing where the payment is made, in order to be able to declare such sales as made within the state and therefore illegal. The apparent influence of prohibitory legislation upon the decisions in such cases tends to weaken their authority upon the simple question of whether title passes in C. O. D. sales at the place of shipment, or at the place of delivery to the buyer.

A good example of the line of cases holding the second view is State v. John O'Neil.[72] Here the action was a criminal prosecution for a violation of the liquor laws of the State of Vermont in selling liquor within the state. A in Vermont ordered liquor from B in New York, which was sent C. O. D. It was held that the parties did not intend any passing of title until the goods were delivered and paid for and that the express company was the agent of the seller, so that its possession was the possession of the seller and hence title did not pass until the goods were paid for by the buyer, and that therefore the laws of the state had been violated by the sale and passing of title to liquor within the state.

[72] 58 Vt. 140, LEADING ILLUSTRATIVE CASES.

CHAPTER XII.

FRAUD AND ITS EFFECT.

81. **Effect on title.**—The essential thing in the question of the passing of title is whether the parties intended that it should pass, and not what induced them to have this intention. Therefore if A really intended to pass title of certain property to B, B will get the title though he has been guilty of the grossest misrepresentation and fraud in bringing about the contract and inducing A to have this intention. Such conduct on B's part may place certain obligations and duties upon him, when he gets the title in this manner, and so also anyone who takes it from him without paying value for it, or with knowledge of the facts, may be bound in the same way, but it cannot be said that the title has not passed.

82. **Contract voidable.**—One who has thus been induced by fraud to part with his title is not without remedy, for not only may he hold the wrongdoer in damages because of the fraud and deceit, but he may also rescind the contract and recover back the property.[73] It seems that, in order to effect such rescission, nothing further is necessary than that the seller should demand back the property from the buyer, and upon his failure or refusal to deliver it, the seller may bring replevin and regain posses-

[73] Barnard v. Campbell, 58 N. Y. 73, LEADING ILLUSTRATIVE CASES.

sion of it. But until the seller has signified his intention to rescind, and thus revest himself with title, the property is in the buyer and if the goods were destroyed the loss would be upon him. The minds of the parties have met upon the subject matter of the contract and title has passed; rescission is merely allowing the seller to get it back, because he was trapped into parting with it in the first place. The right to rescind in such a case is given to the seller by the law, and the law allows him to get back the title merely by his own act, and without any formal action or aid of the law. He may also get back possession if he can, but if he cannot, the law will lend him its aid in doing so.

83. **Contract void.**—If the nature of the fraud was such as to prevent the meeting of the minds of the parties then in such a case there will be no passing of title at all, for intention to pass title is absolutely necessary, and is effective for that purpose, no matter how induced, but any fraud which operates to prevent the formation of the contract or the meeting of the minds of the parties, will absolutely prevent the title from passing.[74] If A should fraudulently represent to B that he was the agent of C and as such induce B to ship goods, no title would pass in such case, for here the fraud has operated so that there is in fact no intention to pass title. B intended to pass title to C, and did not intend to pass title to A, therefore since no contract was in fact made with C because A did not really represent him,

[74] Rodliff v. Dallinger, 141 Mass. 1, 4 N. E. 805, LEADING ILLUSTRATIVE CASES.

there is no passing of title to C; on the other hand B never intended to pass title to A and did not purport to do so. The character of the fraud, therefore, was such as to prevent the actual passing of title to anyone and B therefore still has title to the goods.[75] But if A should represent to B that he is a man of good credit when in fact he is insolvent, and therefore B should sell goods to A, the title in such case would pass, for the parties so intend, even though it was fraudulent representation which made the seller have such intention. Title in such case is in the buyer until the seller does some act to show that he rescinds the sale.

84. **Election to hold fraudulent buyer.**—Since the title has actually passed, if the parties so intended, regardless of the fraud practiced by the buyer, the seller may treat the contract as binding if he so wishes or he may rescind the contract and take the title back. But since the title has actually passed the sale will stand until the seller signifies his intention to rescind, and this he must do within a reasonable time after the discovery of the fraud practiced upon him. The vendor may also by his conduct show that he ratifies the contract, as by suing for the price or taking security for its payment after learning of the buyer's fraudulent conduct.

85. **What constitutes fraud.**—"Fraud is a false representation of facts, made with a knowledge of its falsehood, or recklessly without belief in its truth, with the intention that it should be acted upon by the complaining party, and actually inducing him

[75] Brunswick & Co. v. U. S. Express Co., 46 Iowa 677.

to act upon it."[76] It does not need to be by spoken or written words, but may consist of acts or conduct on the part of one party tending to mislead the other. Sometimes a nod of the head or shrug of the shoulders may be more expressive than any spoken words. The fraudulent representations, no matter how made, must be with reference to something materially connected with the sale, so as to have, to some degree at least, induced the defrauded party to enter into the bargain.

Ordinarily mere silence will not amount to a fraud, for the parties are said to be dealing at arm's length, and there is no duty on the part of one party to give information to the other with reference to the value of the article which is the subject matter of their contract. Some courts, however, hold that if the seller knows that the article is materially defective and knows also that the buyer is laboring under an erroneous impression with reference to the property so that he would not buy if he knew the facts, then failure to disclose the truth under such circumstances will in itself amount to a fraud. It is also generally considered as fraudulent for one to purchase property with the intention of not paying for the same; but some courts do not consider that this amounts to fraud unless the buyer is in fact insolvent, so that he knows that he will not be able to pay. This is perhaps really in the nature of a concealment which in fact amounts to fraud, for the one thing which the seller has in mind is to get payment for his goods, and the very fact of purchasing is a

[76] Anson, Contracts (7th ed.), p. 165.

representation on the part of the buyer that he intends to pay. But mere lack of ability to make payment, or mere insolvency at the time of the purchase, is not enough to make the bargain fraudulent. There must be shown either an actual intent to defraud the seller by securing goods without making payment for them, or facts of such a character that such intent may be presumed.

86. **Rights of innocent purchaser.**—One who purchases goods from a fraudulent buyer, paying full value but purchasing without notice, gets the title which his vendor had, but since he had no knowledge of the fraud he assumes no duty with reference to the property and therefore may hold it as against the original defrauded seller. If he knew of the fraud when purchasing then he would hold in exactly the same position as the one who directly committed the fraud, and the original seller could recover the property from him. He would take it with the same rights and obligations which the defrauding party had.

The reason why the innocent purchaser is protected is because he actually gets the full title from the defrauding party, and though the defrauding party could always be compelled to return the property when the one defrauded rescinds the sale because of the obligations and duties placed upon him by the law by reason of his fraud, still these obligations and duties cannot be thrust upon one who has purchased innocently. He holds the property free and clear, and the only remedy of the defrauded party is to go against the one who defrauded him.

87. **Retention of possession as fraud on creditors.** —After passing title, if the seller still retains the goods in his possession, there is great opportunity for the commission of fraud upon the creditors of the vendor or of the vendee and upon innocent purchasers of the goods. Here there is no fraud as between the buyer and the seller, and so the sale is binding as to them and neither can, on his own action, rescind it. But in so far as they have attempted to defraud the creditors of one party or the other, such creditors, by showing the fraud, may compel the rescission of the sale and the application of the property to their claims. Since it would be so easy for a party to defraud his creditors who are likely to seize his goods, by pretending a sale when in fact none had been actually made, the law has considered it evidence of fraud when a sale has been made but the possession of the goods is still left with the vendor. That is, most states would put the burden upon the vendor in such a case of showing that no fraud was intended by the retention of possession, and require that he explain the purpose of so retaining the goods if the title has really passed. If this were not the case it would be an easy matter for one in financial difficulties to find some friend who would take or pretend to take title to the goods, leaving the other party in the full possession and enjoyment of them, with an agreement that if the property should be seized by the creditors of the "seller," the pretended purchaser should claim the goods as his, thus defeating the creditors, and later, after the immediate danger had passed, return the

goods to the true owner, thus accomplishing a fraud most difficult to detect.

It is necessary that both parties should have intended a fraud upon creditors in order that such sale may be set aside as to them, for if either party acted honestly, since the sale is good as between the parties in any case, such honest party, not being a party to any fraud, can hold the goods as against the creditors of the other, even though the other may have intended a fraud. The fraud in such cases must be a fraud entered into by both the buyer and seller as against such third parties.

88. **Same subject.**—There is also opportunity to thus defraud the creditors of the buyer so that, though an actual sale of the goods was intended, the buyer may keep such property out of the reach of his creditors, by agreeing with the vendor that he shall claim the goods as his own if they are sought to be held by the creditors of the buyer. This arrangement being between the two parties, the actual situation may be entirely unknown to anyone else so that any statements which they may make with reference to the property might be impossible to disprove.

By retaining possession after the sale, the vendor also has the opportunity to defraud innocent persons who may attempt to purchase these goods from the original owner, being deceived by his continued possession into supposing that the title is still in him. Though there is here another possibility of fraud, it is not as strong a case as are the others which have been mentioned.

The various possibilities of committing fraud which are opened when the seller retains possession of the goods, have led many states to enact statutes to protect the rights of third persons. Such statutes have, as a rule, given protection not only to creditors but also to innocent purchasers of the goods, usually declaring that as to such parties the sale shall be void, though allowing the sale to be good as between the parties to it, if the rights of innocent parties are not affected. The Sales Act[77] does not declare the mere retention of possession to constitute fraud, as has been held in some states and adopted by statute in others, but is so stated that the local rule, whatever it is, may be applied. It merely states that when the "retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void."

89. **Possession as evidence of title.**—Ordinarily the mere possession of goods is no evidence of title, and one who purchases from another has no reason to believe that he is the owner rather than a mere bailee because of such possession. Therefore, the true owner cannot ordinarily be estopped from setting up his title and claiming the goods in the hands of any purchaser from the bailee, however innocent the purchaser may be. But if, after a sale has been made, the goods are not delivered to the buyer but are left in the seller's possession, many states have held, without the aid of statutory provision, that the innocent purchaser should be protected,

[77] § 26.

thus making a distinction between cases where a person has given up possession to another and a third person has been deceived thereby, and cases where, though a buyer of goods has received title as between himself and his vendor, the goods have been left in the possession of the vendor. Here if the one having possession wrongfully sells them to an innocent purchaser, such purchaser will be protected. This must be based upon the principle of estoppel, for it is clear that the seller has already parted with the title to the first buyer, for delivery is not necessary in order to pass title. If the seller has actually parted with the title he cannot have any title to pass to the new innocent purchaser. Therefore, if such purchaser is to be protected it is because the seller by his conduct has so made it possible for the innocent party to be deceived that the true owner should be estopped from setting up the actual situation as to his title and ownership in the property.

90. **Same subject.**—The only reason why the true owner should be estopped from setting up his right in this case, while he is not so estopped in the case of a mere bailment of his goods, must be because the purchaser was entitled to rely upon the continued possession by the former owner as evidence that he still holds the goods as he originally did, if there is nothing to give notice of any change in the true owner's relationship to them. To say that the buyer gets title as against his vendor, but that the vendor still has the title to pass to anyone else, does not seem satisfactory. That the true owner may be

estopped to set up his title so that an innocent second purchaser may get the goods is understandable, but not all cases clearly show the essential elements of true estoppel. That is, for a good case of estoppel, it should appear that the second purchaser had knowledge, or reason to believe, that the goods had once been the property of the seller and has therefore purchased in reliance upon that fact, and not merely in reliance upon the present possession which he sees to be in the seller, for that would also cover cases of mere bailment, where this is never so held. But statutes protecting the second purchaser from the original owner who still retains possession, have been so common, and so many of the cases have been decided under such statutes, that it is now difficult to determine the true basis of the decisions. But this much is clear, that the American courts in general have preferred the second purchaser from the vendor in possession, over the first purchaser, and that therefore at the present time, even in the absence of statute on the matter, a buyer must receive delivery of the property in order to be sure that he will get the goods against the claim of a subsequent purchaser.

CHAPTER XIII.

SELLER'S REMEDIES.

91. **Goods in buyer's possession.**—If the goods have been given into the buyer's possession without fraud on the buyer's part, the seller cannot recover the goods from the buyer, even though he refuses or is unable to pay for them. The goods are now the property of the buyer as much as any other goods which he may own and the seller has no greater claim on the particular goods which he has sold to the buyer than has any other creditor of the buyer. There is a plain and simple debt due the seller no different from the claim of anyone else to whom the buyer is indebted, and he must proceed to collect as any other creditor, and the goods sold are now a part of the general assets of the buyer and are available alike to any of his creditors. The seller's only remedy, therefore, is to bring an action for the price of the goods as agreed upon by the parties and proceed as for a debt contracted in any other way. If fraud has been practiced on the seller which induced him to part with the goods, he may rescind the sale, as has already been explained,[78] and recover back the goods so long as they have not passed into the hands of an innocent purchaser who has paid value for them. But if the seller has suffered any damage by the fraud of the buyer which induced the sale, the

[78] See Chap. XII, § 82.

seller should, of course, also have an action to recover against the fraudulent party for the injury.

92. **Goods in seller's possession.**—When the goods are retained in the seller's possession he has a lien thereon as has been shown in a previous chapter,[79] and there are three remedies open to him. The situation of the seller was stated by Earl, C., in Dustan v. McAndrew,[80] as follows: "The vendor of personal property in a suit against the vendee for not taking and paying for the property has the choice ordinarily of either one of three methods to indemnify himself: (1) He may store or retain the property for the vendee, and sue him for the entire purchase price; (2) he may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or (3) he may keep the property as his own, and recover the difference between the market price, at the time and place of delivery, and the contract price."

93. **Where title has not passed—Damages.**—If there is a valid contract to sell but the title has not yet passed and the buyer fails or refuses to take the goods, there are various remedies open to the seller, not all of which, however, are admitted by all courts.

The seller's most obvious remedy in such a case is an action for damages for the breach of the contract. This is not different in principle or application from any other contract action. The measure of damages to which the seller is entitled upon the

[79] Chap. VIII.
[80] 44 N. Y. 72.

buyer's default is the difference between the price which the buyer was to pay and the value of the goods at the time and place set for performance. This will put the seller as nearly as possible in the same position as if the contract had actually been performed, which should always be the basis upon which damages are assessed by the court.

If, however, the contract price and the market price are the same, or if the market price is higher than the contract price, the seller may still recover nominal damages, for, though the seller has suffered no actual damage, nevertheless the buyer is in default by failing to perform the contract, and the court will give nominal damages, that is, such a small sum as one cent or one dollar, merely to show that the buyer is in default. Thus, the buyer's failure or refusal to take the goods may actually result in a benefit to the seller, if the price of such goods has materially advanced, yet the seller is, nevertheless, entitled to nominal damages, since the buyer is technically in default in not carrying out his agreement.

94. **Agreement to pay regardless of passing of title.**—The buyer may agree that upon the doing of certain acts by the seller he will become bound to pay him a certain sum of money, and this without regard to the question of whether or not title is to pass. If in such a case the seller performs as agreed, he is entitled to the money, it being understood that when the money has been paid, then the title is to be in the buyer, for it would not be fair to allow the recovery of the sum agreed upon as

the full price of the goods, and still leave the seller with the goods also. In White v. Solomon[81] the buyer agreed to pay thirty-five dollars upon the delivery of a manikin at the express office, and it was assumed in the case that title was not to pass by such delivery only. The court said, "The buyer has said in terms that although the title does not pass by the delivery to the express company, if it does not, delivery shall be the whole consideration for an immediate debt of the whole value of the manikin, and that the passing of the title shall come as a future advantage to him when he has paid the whole. * * * If a man is willing to contract that he shall be liable for the whole value of a chattel before the title passes, there is nothing to prevent his doing so, and thereby binding himself to pay the whole sum."

Such decisions as this have been often misunderstood and misinterpreted so that they have been taken as standing for the doctrine that even though the title has not passed, nevertheless the seller might bring action for the purchase price. Some courts do take such a view, as is stated in a later section,[82] but the two principles are distinct and separate and should not be confused.

The Sales Act[83] states clearly the law that the payment of the price may be due by the terms of the contract, even though the title has not yet passed, as follows: "Where, under a contract to

[81] 164 Mass. 516.
[82] § 97.
[83] § 63 (2).

sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract."

95. **Goods to be made to order.**—Most courts have held that when the seller has made goods according to a special order given by the buyer, so that they would not ordinarily be salable on the market or would have no market value, in such case the seller may tender the goods to the buyer, and if he refuses to accept or receive them, store them for the buyer and bring action against him for the full price.[84] The result in such a case is to force the title upon the buyer against his will. The effect in this case is not unfair, for, since the goods have been made to the buyer's order and to fit his peculiar ideas, they will, in all probability, be worth more to him than to anyone else. In fact, if the goods are very unusual it may be very difficult to estimate with accuracy and with fairness to both parties the exact damages which should be given. The goods may have no market value because of the peculiar way in which they are made. Therefore, it is not unjust to make the buyer take them, since the probability is that they are worth more to him than to anyone else, and to make him pay the seller the full price which he has contracted for.

If the goods are made in a very peculiar manner

[84] Bement v. Smith, 15 Wend. 493 (N. Y.), LEADING ILLUSTRATIVE CASES.

to fit the ideas of the buyer, damages given would be estimated as in any other case, i. e., the difference between the contract price and the market value, but the market value may be little or nothing, since the goods are made to fit the peculiar notions of a particular person. The result is that damages will amount to practically the whole purchase price, and this has undoubtedly induced the courts to say that it would come more nearly to accomplishing justice under such circumstances to make the buyer pay the remainder of the price and take the goods which ought to be worth more to him than to anyone else.

96. **Same subject—Specific performance—Work and labor.**—The practical outcome of this relief is to compel specific performance of the contract at law, since the result is that the buyer is compelled to pay the full price and is virtually forced to take title to the goods, a relief which is regularly given only in a court of equity. The courts of law do not call it by this name, however, but the result accomplished is certainly much the same.

Some courts have also been influenced, undoubtedly, by the tendency to class such contracts as contracts for work and labor[85] rather than as contracts of sale. Here again, if they allow a recovery for work and labor and materials furnished at the order of the buyer, it is not going very much further and is, perhaps, accomplishing a more just result to allow an action for the full contract price and then give the goods to the one at whose instance the work and labor was furnished, to let him dis-

[85] See Chap. XIX, §§ 143-147.

pose of them as he pleases or make the best use of them which he can.

97. Contracts for ordinary goods.—It is not a very great extension of the result worked out in the two previous sections, i. e., where goods have been made specially to order, to apply the rule generally, rather than to limit it to any special class of goods. And this seems to have been done by some courts, with the result that even though title has not yet passed, the seller may tender the goods to the buyer and recover the whole purchase price, thus forcing the buyer to take title. Not all courts have gone this far, for to apply the rule to goods of an ordinary character overlooks the principle upon which relief was first granted, where the goods were made specially to order.

By this rule, the buyer who is in default cannot, by his own act, prevent the title from passing to him and is thus made to assume all the duties and liabilities of a purchaser of property. To allow the seller to recover the full price and force the buyer to take the property, rather than to limit the seller to the more usual remedy of an action for the damages suffered because the buyer has not taken the title, seems most unusual and is hard to work out on any theory consistent with the operation of a court of law in other cases.

However, many of the cases containing statements to the effect that the seller may recover the full contract price even though the title has not passed, will be found to be cases where, by the terms of the bargain, payment was to be due regardless

of the passing of title, cases of goods made to special order, or cases where the bargain was so interpreted that the seller was allowed by the previous assent of the buyer to appropriate goods to the contract and thus pass title before giving up possession.

The Sales Act[86] has adopted a rule which is more in the nature of a compromise, rather than a definite statement of the law adopted in actual decisions. It provides: "Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, * * * the seller may offer to deliver the goods to the buyer, and if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price." Where this statement of the law is adopted the result will be to allow recovery of the price in many cases where goods are apt to be the sort that "cannot readily be resold for a reasonable price," but without limiting it to this class, leaving it a question for proof in each case whether the goods can "readily be resold for a reasonable price," whether they have been specially made to order or not.

98. **Obligation to tender the goods.**—In whatever form the doctrine has been allowed by the courts, whether in the more limited application to cases of goods made to order or in the much broader form applying to goods of any character, this

[86] § 63 (3).

remedy, i. e., action for full price, is available to the seller only when he has made an actual tender of the goods to the buyer, unless the buyer's conduct is such as to excuse him from an actual tender. When such tender of the goods has been made and refused, the seller must then store the goods with some third person or retain them in his own possession with notice to the seller that they are at his disposal. It would seem that such act of the seller either in storing or giving notice must be the moment of time when the title to the goods passes, or if the seller retains possession without giving notice, then the time when he brings action for the price will mark the moment of the passing of title.

Here, as in the case of rescission of a sale where the result is that the seller is allowed to take the title back without the buyer's consent, the law courts seem to have adopted a short cut, much different in form and effect from the remedy by way of damages which is usually given, and without forcing the parties to go into a court of equity, have allowed a form of relief, which permits the innocent party at his own election to compel the party in default to perform his obligation and as nearly as possible remedy the effect of his wrongful act. The right of a defrauded party to rescind the contract and revest himself with title, has been universally recognized by the courts of law, and this newer right allowed the seller by many courts, by his own act to vest the title in the buyer who wrongfully refuses to receive it, seems not an unreasonable extension of the same principle.

CHAPTER XIV.

BUYER'S REMEDIES.

99. **Action for damages.**—When the seller fails or refuses to transfer the title to the goods to the buyer, or if, though the title has in fact passed, the seller fails to deliver the goods to the buyer, the buyer may bring action against the seller to recover any damages which he may have suffered thereby.

If there has merely been a contract to sell, which contract the seller has broken, the buyer's measure of damages for the non-delivery "where there is an available market for the goods in question, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver."[87]

When the title to the goods has actually passed, if the seller refuses to perform the contract and deliver over the goods, the buyer may also bring action for the damage suffered, and such damage will be estimated in practically the same way as when no title passed. But since the title has passed, the buyer must owe the full purchase price for the goods; and if through the fault of the seller he is

[87] Sales Act, § 67 (3).

deprived of the goods he should recover their full value measured at the time and place agreed upon for delivery. The result will be that if the buyer has not yet paid the purchase price this will be deducted from the amount to be recovered as the value of the goods, making the measure of damage just the same as where no title had passed. Nor is the case different ordinarily if the full purchase price has been paid, for the value at the time and place of delivery will include the purchase price plus any increase in value which the goods would have if they had been delivered according to the terms of the agreement. If the goods have declined in value the buyer will be allowed to recover the money which he has actually paid.

100. **Purchase price paid.**—In one situation, however, a different right of damage than that above stated has been allowed to the buyer, and that is where the buyer has paid the purchase price for the goods before receiving them. Here there have been two different rules applied to determine the buyer's right of recovery. Since the buyer has parted with his money, he may not be in financial condition to purchase other goods to replace those which the seller has failed or refused to deliver, and hence it is unfair to him to allow the seller by his wrongful act to retain the goods and secure any rise in value which may come about after the date set for delivery. The possibility of this increase in value is in many cases the buyer's only reason for purchasing the goods, and if he intends to resell, is his only chance of profit. Should the buyer then be allowed

to recover only the value at the time set for delivery, or at the time his action is brought, or should he be allowed to recover the most that he might have made by selling the goods when the market was the highest? Most courts have allowed the buyer only the value at the time and place of delivery, together with interest on this amount up to the time of the recovery against the seller, this interest being considered as compensation for the delay.

Some courts have adopted the rule of "highest intermediate value" as fixing the measure of the buyer's recovery, i. e., they allow the buyer's damage to be measured by the difference between the contract price and the highest value which the goods have attained at any time between the date set for delivery and the bringing of the buyer's action. This rule is very hard upon the seller, and even though he is in the wrong he ought not to be treated unjustly. It practically assumes that the buyer would have had such business skill and judgment that he would have held the goods until, and sold when, the highest point in the market was reached. Such a measure of damages gives too great an advantage to the buyer, who is practically much better off, in such a case, because the agreement was not performed than if it had in fact been carried out.

Still another measure of recovery allowed by some courts is the difference between the purchase price and the price when the action is brought. As stated, however, perhaps the majority of courts favor the rule which really gives the buyer the same measure of damage when the price has been paid as he would

have had if it had not been paid, but with the addition of interest, as a compensation for the delay, on the full value of the goods at the date of the breach of the contract. The Sales Act[88] does not adopt any of the various rules which have been worked out in different jurisdictions, but leaves it open for each state to apply the rule there in force, merely providing that "the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld."

101. **Rescission for failure or refusal to perform.**—The buyer may also rescind the sale if the seller has failed or refused to transfer the title to him, and thus cast all the risks of ownership back upon the seller, and recover from the seller any money which he may have paid him. It really amounts to forcing title back upon the seller when the buyer brings action for the conversion of his goods, for the buyer asks to recover from the seller the full value of the goods, and since the buyer cannot have both the goods and the money which represents their full value, if the seller is compelled to pay the money sum adjudged as the value of the goods, the title thereto will again vest in the seller.

102. **Recovery of money paid when title fails or goods are non-existent.**—If the seller cannot give a good title to the buyer, he cannot keep the money which the buyer has paid him, for it must be the understanding of the parties that the money was paid for the passing of title to the goods to the

[88] § 66.

buyer. Unless it clearly so appears, it cannot be supposed that the buyer gave his money for the mere chance that the seller could give him title, or that he gave it for whatever title the seller might have and could give, taking his chances as to whether the seller had a defective title or any title at all. So also if the goods are destroyed after the purchase money has been paid, but before the title was actually passed to the buyer, or if, unknown to the parties, the goods are not in existence at the time when they meant to pass title, then the buyer may recover back any money paid. The loss is thrown upon the one who owned the title at the time the loss occurred, for the buyer has paid his money for property and did not intend to bargain merely for a chance, unless such was the clear understanding of the parties.

103. **Replevin for the goods.**—If the title to the goods has actually passed, but the seller refuses to give the goods over to the buyer who is in no way in default, the buyer is entitled to the goods themselves if he desires them and is not compelled to look only to damages or the recovery back of his purchase money. By the action of replevin he may secure the goods themselves just as can any person whose goods are wrongfully detained and held in the possession of another. If the buyer has paid for the goods, or if he has purchased them on credit, which credit has not yet expired, and the buyer is not insolvent, he is entitled to the actual possession of the goods and may, through the legal proceeding of replevin, secure them.

104. **Can buyer force the seller to sell?**—While some courts allow the seller to force the title upon the buyer, though he does not wish to take the goods,[89] the buyer has not generally been allowed a corresponding right to make the seller sell and transfer the title against his will, except in cases where the property is of such a special and peculiar nature or is of peculiar value to the purchaser, so as to make it properly the subject for the equitable remedy of specific performance.[90] The reason of this distinction is, perhaps, to be found in the fact that the buyer is not in need of such protection, in that he may usually be able to get goods of the same kind elsewhere at the regular market price and will be easily and fully compensated by being allowed to recover in damages for the seller's breach of contract. It is ordinarily much easier to buy for ready money than it is to make a fair sale for ready money. The seller has his money tied up in the goods, while ordinarily the buyer still has his money and may easily secure the goods from others. But it must be borne in mind that the idea of allowing the seller to force the title upon the buyer is a most unusual doctrine, not followed by most courts except in the cases of goods made specially to order, and hence it is not surprising that the courts should limit its application rather than extend it to all possible cases.

The Sales Act,[91] in providing for specific performance, does not give any new rights to the buyer but

[89] See Chap. XIII, § 97.
[90] See subject, EQUITY.
[91] § 68.

merely states the rights which the buyer would have in a court of equity under special circumstances: "Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages."

105. **Inspection and warranty.**—The special rights which are allowed to the buyer with reference to the inspection of goods[92] that are offered in fulfillment of the contract, and his rights upon breach of warranty[93] in the sale of goods, will be discussed in separate chapters.

[92] See Chap. XV.
[93] See Chap. XVIII.

CHAPTER XV.

BUYER'S RIGHT OF INSPECTION.

106. **Nature of the right.**—One who has bargained for goods, whether buying specific goods or goods purchased by description and to be selected by the seller, is entitled to see what he is getting. He need not take the seller's word for it but he has a right to look at the goods themselves to see that they are in fact the goods bargained for, or if merely looking at them will reveal nothing, then to make such tests as are reasonably necessary to determine the facts. Should the seller refuse to permit a reasonable inspection, he cannot then hold the buyer to the bargain or recover damages from him.

107. **When title is to pass—On delivery to buyer.**—If the bargain calls for delivery to the buyer, he has the right to inspect the goods before title shall actually pass to him, or, as it is usually stated, the right of inspection is a condition precedent to the passing of title. The seller has not carried out his part of the bargain so as to pass the title, merely by delivering to the buyer, for title will not pass until the buyer accepts, and before accepting or before he can be in default for not accepting he has the right to inspect the goods to see that they are the goods contracted for. Therefore, if the seller refuses to allow inspection he cannot hold the buyer

on the contract or collect from him the purchase price, since the seller is himself in default and has failed to perform that which was a condition precedent to the passing of title. The Sales Act[94] states the generally accepted view, that the right of inspection is in the nature of a condition precedent to the passing of title under ordinary circumstances: "Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract."

108. **Same subject—On delivery to carrier.**—Even though, by the usual rule of sales, the title has passed to the buyer upon the delivery of the goods to the carrier to be transported to the buyer, yet this does not deprive the buyer of his right of inspection, but merely changes the manner in which he is to exercise his rights. It may be that the buyer would have had the right to demand inspection before the goods were taken on board by the carrier for transportation, but his failure to exercise his right at this time does not deprive him of his remedies, for when the goods have been delivered to the buyer he has the right, not only to inspect but after he has made inspection if he finds that the goods do not correspond to the description or are not the specific goods ordered, to throw the goods back upon the seller; and he will secure a perfect defense to any action for the purchase price which may be brought

[94] § 47 (1).

against him, or will have the right to recover back the purchase price if he has already paid the same to the seller.

Inspection would be a worthless right in the large class of cases where goods are ordered from a distance, if the buyer's right was limited only to inspection before title passes, since it would be practically impossible in most cases for him to make inspection before the goods are delivered to the carrier. The rule as given in the Sales Act[95] states the rights of the buyer in this regard as they have been fixed by the decisions, allowing opportunity for inspection before it can be considered that the buyer has accepted the goods as complying with the contract: "Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract."

109. **When and where inspection should be made.** —If the goods are to be actually delivered to the buyer, then the time and place for inspection are upon his receipt of the goods, precedent to his acceptance of the same. But if title has passed before the buyer has had opportunity to inspect, then inspection should be made within a reasonable time after they arrive and are in a situation where inspection is possible.[96] But in either case, if merely looking at the goods will reveal nothing, then the buyer, even

[95] § 47 (1).

[96] Pierson v. Crooks, 115 N. Y. 539, 22 N. E. 349, LEADING ILLUSTRATIVE CASES.

though he takes the goods into his possession, still has the right to make such tests and examination of the goods as are reasonable and necessary in order to reveal their nature and character.

110. **Use or test of goods.**—When it is necessary to use or test the goods, this does not prevent title from passing until such inspection as here required has been made, but title will pass as in the case of goods delivered to the carrier, subject to rescission on the part of the buyer if the goods turn out not to be of the kind called for by the contract. Where the goods are of such a nature that they can only be tested by actual use, then the time given to the buyer to determine their character must extend until such reasonable time as the goods would ordinarily get into the hands of the buyer's customers and until he has opportunity to receive objections made by them. But if the character of the goods can be determined by making certain tests of the goods, the buyer should make such tests if he wishes to make use of the right given him upon inspection, and a failure to do so will show that he has waived the right which the law has here given him. If the goods are not as they should be, any portion used in making the tests cannot be charged up to the buyer, since the seller is the one at fault, and the buyer had the right to make such inspection. However, any other expense incurred by the buyer in making tests must be borne by the buyer, for he is not bound to make them and can be considered as doing it only for his own satisfaction. What is "reasonable opportunity for examination," and

what acts may be proper in making examination, will depend upon the nature and character of the goods which are the subject matter of the contract.

111. **What constitutes acceptance.**—The Sales Act[97] has clearly stated the law as to what constitutes acceptance, as follows: "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them." It has been held that, after the buyer has decided to reject the goods, if he then uses any portion of them in making a test, this act is inconsistent with ownership in the seller and binds the buyer to keep the goods.[98]

112. **Inspection compared with breach of warranty.**—As a condition precedent to the passing of title, the right of inspection is clearly a separate and distinct right given by the law of sales to the buyer for his protection. But where title has already passed, what is spoken of as the right of inspection, in such cases, has reference only to the question of the remedies which may be given to the buyer when the seller has not complied with the terms of the contract. It will be observed that the buyer's right is to have a complete defense to an action by the seller for the purchase price, or if

[97] § 48.

[98] Cream City Glass Co. v. Friedlander, 84 Wis. 53, 54 N. W. 28, LEADING ILLUSTRATIVE CASES.

such price has already been paid, to recover it back. Both these remedies really amount to allowing the buyer to rescind, and the effect of the right of inspection is to allow the buyer a reasonable opportunity to determine whether the goods are as bargained for and to give him the right to rescind and pass the title back to the seller if they are not. This result is the same as where rescission is allowed for breach of warranty. In states where the doctrine of rescission for breach of warranty is not recognized, these special rights given to the buyer after title has passed, under the name of "Inspection," are of great importance, as they secure to him a very complete and satisfactory remedy which he would not otherwise have.

CHAPTER XVI.

IMPLIED WARRANTIES.

113. **Rule of caveat emptor.**—In general the rule of the common law as developed in England and in this country is "caveat emptor," let the buyer beware, that is, in the sale of goods the buyer must understand that he takes the risk as to the quality of the goods which he is purchasing. The rule of the common law differs very materially in this respect from that which has been adopted in the civil law now in force in most of Europe, since there it is held that "a sound price implies a sound article." Originally the common law applied the rule of caveat emptor with the greatest strictness, to the extent of holding that, in the absence of a warranty expressly stated on the part of the seller, the buyer took all risks, not only as to quality, but also as to title. In so far as the law has recognized any implied warranties, whether of title or of quality, they may be regarded as operating as limitations upon the strict rule of caveat emptor as originally recognized by the common law.

114. **Warranty of title—Limitation on rule of caveat emptor.**—The idea that the seller, merely by offering to sell goods, impliedly warrants that he has the right and power to do so and therefore that he has a good title and will pass such title to the purchaser, is now generally recognized in our law, and

is therefore a limitation upon the idea that the buyer must beware and must take the risk that the seller is not really the owner of what he is selling.[99]

115. **Same subject—Goods in seller's possession.**—That a person who has the actual possession of goods and offers to sell them, thereby warrants that he will give good title, is now everywhere recognized. It is so reasonable to infer that this is what he intends and what the buyer has every reason to believe that he intends, that it seems odd that any other rule should ever have prevailed. Since the vital and fundamental thing in the law of sales is the passing of title, every idea of honesty would dictate that in offering to sell, the seller means that he has something to sell, that he has title and can pass it, since the buyer's whole object in purchasing is to get the goods as his own, that is, get title to them. Therefore we now understand that the mere offer to sell goods which are in the seller's possession amounts to a warranty that he has the title to the goods and will pass it to the buyer. In other words, he impliedly warrants that he will give the buyer a good title.

116. **Same subject—Goods not in seller's possession.**—Though it has often been stated that no such warranty was implied if the seller was not in possession of the goods at the time the sale was made, the decisions which actually so hold are few in number, though the statement has been made by way of dictum in many cases. Upon principle there seems no good reason why the seller should not be held to

[99] Gould v. Bourgeois, 51 N. J. L. 361, LEADING ILLUSTRATIVE CASES.

give an implied warranty of title as much when not having possession as when the goods are actually handed over by him to the buyer. The actual risk which the buyer runs that the seller does not really have title may possibly be a little greater when the seller does not have possession of the goods, but from the standpoint of what the seller is offering to give in consideration of receiving the buyer's money, it is hard to see that he can honestly be intending or offering to do any less here than where he has the possession of the goods and there seems no reason why the buyer should be led to believe that he is here to get less for his money. The buyer wants to become the owner in one case as much as in the other, and certainly the seller, unless he actually has a fraudulent intent, must be considered as offering the title unless he expressly limits his bargain.

The English cases have made no distinction depending upon the possession, and the tendency of the later American decisions is the same way, and this is perhaps the present weight of actual authority on the subject. This tendency is also recognized in the Sales Act,[1] which makes no distinction in implied warranty of title dependent upon the seller's possession. It is there provided that: "In a contract to sell or a sale, unless a contrary intention appears, there is an implied warranty on the part of the seller that in case of a sale he has a right to sell the goods, and that in case of a contract to sell he will have a right to sell the goods at the time when the property is to pass."

[1] § 13 (1).

117. **Same subject—Effect of buyer's knowledge.**—Of course, the seller may always cut down this implied warranty by express limitation. So also if the buyer knows that the seller does not have a good title, he cannot rely upon the seller's conduct or offer of sale as being an implied warranty of title. Thus if the seller sells goods as an unredeemed pledge, it cannot be supposed that he warrants the title to the buyer, for he has made known the special capacity in which he sells and so he clearly does not purport to have the title and cannot therefore be said to warrant it to the buyer. But the mere fact that goods are second-hand goods, or that the seller is a dealer in second-hand goods, does not in any way cut down the usual warranty, for one may have a good title to goods of this kind, and the mere fact of selling them as his own implies a warranty on the part of the seller that he has the title. But if the seller purports to sell, not the entire property right in the goods, but only such title as he himself may have, he thus takes away the warranty which would ordinarily be implied.

118. **Same subject—Applied to liens, encumbrances, etc.**—The warranty of title which is inferred in the ordinary sale of goods, implies that the seller has not only some title, but that he has the full and complete title to the goods, entirely free and clear from all claims or rights of others. If there is any claim by way of lien, or mortgage, or other encumbrance upon the goods this constitutes a breach of the implied warranty of title. The Sales Act[2] states

[2] § 13 (2).

the general rule, that there is "an implied warranty that the goods shall be free at the time of the sale from any charge or encumbrance in favor of any third person, not declared or shown to the buyer before or at the time when the contract or sale is made."

119. **Same subject—Fraud of seller.**—Not only is the seller liable for breach of the implied warranty if he does not have a full and clear title to the goods which are the subject of the sale, but he may also be held liable for his fraud if he sells goods knowing that he does not have title, or that his title is defective.

120. **Implied warranty of merchantability—Caveat emptor.**—In general, with reference to the quality, the doctrine of caveat emptor applies, and the buyer must beware as to the quality of the goods which he is purchasing, since the payment of a fair price does not imply that a sound article will be given in return. But the doctrine of caveat emptor, with reference to the quality of the goods, is limited by the requirement that they should be merchantable of their kind, and within the limits of this principle the buyer does not take the risk as to their quality.[3] In the situations in which the warranty properly applies it protects the buyer to this extent: that the goods must at least be of fair quality so as generally to be considered salable as goods of the kind and description contracted for. It is not a warranty which can be very strictly defined, but it does

[3] Wilson v. Lawrence, 139 Mass. 318, 1 N. E. 278, LEADING ILLUSTRATIVE CASES.

not entitle the buyer, on the one hand, to goods of the best quality or of any particular degree of fineness, but, on the other hand, it does protect him from goods having any unusual or remarkable defects.

121. **Same subject—Goods not subject to inspection.**—When the sale concerns goods which are not before the parties so that the buyer has no opportunity to inspect them and is, therefore, not able to discover any defects, as where the goods are ordered by description and the seller then selects goods to answer the description, a warranty that the goods so selected are merchantable of their kind is implied. Since the buyer, in such a case, is not in a position to determine the quality or character of the goods, it must be inferred that he authorized the selection of goods of merchantable quality only, and that by selecting and sending goods in compliance with the buyer's orders, the seller impliedly represents that they are of this character.

There can be no difference in this situation, whether the seller is the manufacturer of the goods or a mere dealer, for the reasoning which implies a warranty would apply as much to one situation as to the other, as in each case the buyer leaves it to the seller's judgment to select the goods which are called for by the contract.

The Sales Act[4] states the law as it has been established by the courts as follows: "Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an

[4] § 15 (2).

implied warranty that the goods shall be of merchantable quality."

122. **Same subject—Goods subject to inspection.** —If the goods are before the parties so as to be subject to inspection by the buyer, there may or may not be an implied warranty, dependent upon the situation of the seller. Most courts have said that if the seller in such a case is only a dealer in the goods, the seller and the buyer stand upon practically an even footing, and therefore the doctrine of caveat emptor applies. If the goods are open to inspection, then the buyer is not relying upon the seller to select, but is relying upon his own judgment, and, further, the fact that inspection would reveal nothing, that is, that the defects are latent, makes no difference, for there is usually no more opportunity for one party to know of defects than for the other, and, therefore, the usual rule, let the buyer beware, should apply, and the burden should not be thrust upon the innocent seller.

But if the seller is in fact the manufacturer or grower of the article sold, his opportunities for knowing the character of the goods and discovering any defects are ordinarily very much greater than those of the intending purchaser, and one purchasing from such a seller would have much greater reason to place reliance upon him than upon one who is only a dealer in the goods. This inequality in the situation of buyer and seller, when the goods are sold by the manufacturer or grower, seems the only reason for implying a warranty here, which is not implied if the seller is only a dealer in such goods.

But in the Sales Act,[5] the distinction made in the decisions with regard to the situation of the seller was disregarded, and anyone, whether manufacturer or dealer, is liable for latent defects in the goods. The statement of the Sales Act is: "If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed." It is to be noticed that this statement speaks only of examination, and not of reasonable opportunity for examination. In this it also goes beyond present decisions and allows the buyer to rely upon the skill and judgment of the seller if he wishes to do so, and does not force him to assume any responsibility upon his own judgment.

123. **Same subject—Warranty of fitness for particular purpose.**—When the buyer makes known to the seller the purpose for which he wants an article and leaves it to the judgment of the seller to select it for him, the very act of making the selection is construed as an implied warranty that the article is suitable for the purpose specified.[6] The fact that the goods are unmerchantable may prevent their being suitable for the purpose for which they were intended to be used, but though the two warranties may thus often overlap, they are not one and the same, for even though the article is merchantable it still may not be fitted to the use which the buyer has stated that he intends to make of it, so that there may be a breach of one of the implied warranties without a breach of the other.

[5] § 15 (3).

[6] Randall v. Newson, 2 Q. B. Div. 102 (Eng.), LEADING ILLUSTRATIVE CASES.

The basis upon which this warranty will be implied is the reliance of the buyer upon the seller's judgment. If no specified goods are bargained for, but the selection is left to the seller, it may reasonably be said that if he knows the purpose for which the buyer wishes the goods, his act in selecting them is impliedly a representation that they are fit and suitable for that purpose, and the same implication may be made even though the goods are before the parties and hence subject to inspection, though in such a case it may be much more difficult to work out any implied warranty, for the buyer may wish these very goods and no others, using his own judgment that they will be suitable for the purpose specified. But in such a case it may be easier to show a reliance on the seller's judgment if he is the manufacturer of the goods rather than a mere dealer, so that he may be relied upon as having special or peculiar means of knowing the fitness of the goods for the use intended. But in all cases, whether the goods are specific or are sold only by description and selected by the seller, the question whether there is an implied warranty of fitness for a particular purpose will depend upon whether or not the buyer has relied on the seller's skill or judgment to furnish an article suitable for the special purpose designated.

The Sales Act,[7] in making no distinction with reference to the warranty of fitness for a particular purpose between the seller who is the manufacturer or grower and one who is merely a dealer, states

[7] § 15 (1).

the general rule; but in making any seller liable, whether a dealer in the particular goods or not, if the buyer has relied upon his judgment, it perhaps goes beyond actual present decisions, though the extension follows out the theory underlying the implied warranty in this class of cases. The Sales Act provides: "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

124. **Same subject—"Known, described, and definite article."**—One thing which clearly negatives an implied warranty of fitness for a particular purpose is the buyer's request for a "known, described, and definite article." If he gets what he calls for he cannot complain because it will not fit the use for which he intended it, unless an express warranty was given. Thus, when the buyer ordered a "No. 2 size refrigerating machine" of the kind manufactured by the defendant, there was no implied warranty that that machine would cool the plaintiff's brewery to the proper temperature, even though the defendant knew the exact purpose for which the purchaser intended the machine. The buyer asked for a known, described, and definite article, and he got that for which he asked and it cannot be inferred that he meant to rely upon the seller's judgment to select a machine to accomplish the purpose for which he intended it to be used, but, rather, it

appears that he had decided for himself what sort of a machine would be adequate for his purpose, and therefore the seller's only obligation was to furnish him goods which answered the description as given.[8] Whenever any article is purchased by its trade name or number, that, almost of itself, negatives an implied warranty, and if the buyer wants a warranty in such a case as to what the article will accomplish, he should ask for an express warranty. The statement as made in the Sales Act[9] is: "In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose."

125. **Implied warranty in sale of foods.**—With reference to the sale of articles of food a special rule has been established. Here even a dealer is held liable on an implied warranty that the foods are wholesome and fit for human consumption if he sells to one who buys for immediate consumption, and not for resale. But it seems that the rule is limited to those who are regular dealers and does not apply to sales by one other than a dealer even though he may be the grower of the article.

The rule, in so far as it goes beyond the usual implied warranties previously discussed, has generally been applied to those only who might strictly be termed dealers in provisions; and some cases, in applying this special implied warranty with reference to foods, have not even held the producer liable

[8] Seitz v. Brewers' Refrigerating, etc., Co., 141 U. S. 510, LEADING ILLUSTRATIVE CASES.

[9] § 15 (4).

unless he is also a dealer, even though he knows his products are to be used for human consumption, unless he has actual knowledge of defects. Thus, where a farmer sold diseased meat for domestic use, it was held that he was not liable on an implied warranty. The court said: "In making casual sales from a farm of its products, to hold the owner to the duty of ascertaining at his peril the condition of the articles sold and of impliedly warranting, if sold with the knowledge that they are to be used as food, that they are fit for that purpose, imposes a larger liability than should be placed upon one who may often have no better means of knowledge than the purchaser."[10]

Means of knowledge seems to be the basis of the liability even in the case of the dealer, and many cases have held that the warranty now under consideration does not apply in the purchase of canned goods for immediate consumption. "Everybody purchasing ought to be presumed to know that the retail merchant, who sells to the consumer food sealed in cans, and with which he has no connection other than as conduit between packer and consumer, has no superior means of knowing the contents of the can than the purchaser has, and in that event if the purchaser desires to protect himself he may * * * get an express warranty as to the quality of the goods."[11]

This special warranty is applied only when a sale of food is made directly for human consump-

[10] Giroux v. Stedman, 145 Mass. 439, 14 N. E. 538.
[11] Julian v. Laubenberger, 38 N. Y. S. 1052.

tion, and hence does not apply in a sale to a dealer, nor does it apply to sales of food for animals. The reason behind this implied warranty is the greater opportunity which the dealer ordinarily has to know the quality and condition of the goods in which he is dealing, and perhaps decisions were also influenced by the great danger which would result to the buyer from carelessness or negligence on the part of the seller if he were not under obligation to furnish wholesome articles.

126. **Express warranty does not preclude implied warranty.**—An express warranty does not necessarily do away with an implied warranty which would otherwise have existed, unless there is something in the express warranty inconsistent with the implied warranty or clearly showing that it was meant to be done away with. Thus, if there is an express warranty as to quality, an implied warranty upon the same subject would be considered as excluded and it would be held that the parties meant to rely on the express warranty only. But "An express warranty or condition does not negative a warranty or condition implied * * * unless inconsistent therewith."[12]

[12] Sales Act, § 15 (5).

CHAPTER XVII.

EXPRESS WARRANTIES.

127. **Definition of warranty.**—The definition of express warranty as stated in the Sales Act[18] represents the attitude of most American courts with reference to what statements shall be treated as warranties. The definition is: "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon." It is generally held that the intention of the seller in making the statement is immaterial. It is the effect which his statement might reasonably have had upon the purchaser, and which it in fact did have, which should be the material thing in determining whether the seller ought to be held to a warranty or not.

128. **What constitutes a warranty—Early law.**—Originally it was considered that the seller did not give a warranty when making a sale unless he expressly said that he warranted or used the word "warrant" in some way. Even though he made representations as to the character and qualities of the article sold they were not treated as binding upon him except as he might be held liable for deceit in making them, but he could not be held on

[18] § 12.

a warranty unless he expressly said that he warranted, and, in the absence of such word, the rule was "caveat emptor," and the buyer had to take all the risk as to the quality and condition of the goods.

129. **Same subject—Modern rule.**—But today we treat the statements made by the seller, whether made voluntarily or in answer to questions of the buyer, as the seller undoubtedly means them, that is, as representations which are intended by the seller as inducements to the contract, and in reliance upon which the contract is made. If the seller says that the horse he wants to sell is sound, he certainly means that the buyer should rely upon his statement in making the purchase just as much as if he had said that he warranted the horse to be sound.[14] A statement as to the quality of the article which is the subject matter of the sale certainly must have been intended by the seller to influence the buyer, and, if it might reasonably do so, and the buyer has relied upon it in making the purchase, the seller ought not to be allowed to say that the buyer should not in fact have relied upon it. With the exception of one state (Pennsylvania) all jurisdictions now consider it immaterial whether the word "warrant" is used or not. "In order to constitute a warranty it is not necessary that the word 'warrant' or 'guaranty' should be used. * * * A representation or statement of an alleged fact may amount to a warranty if it is made to appear from

[14] Chapman v. Murch, 19 Johns. 290 (N. Y.), LEADING ILLUSTRATIVE CASES.

all the circumstances that the parties intended and so understood it to have that effect."[15] Matters of description if relied upon amount to warranties. Thus, where a purchaser called for "Early strap-leaf red-top turnip seed," the seller in filling the order warranted that the seed was of that variety.[16]

130. **Warranty a contractual obligation.**—Since warranty is a matter of contract, consideration for it must be found as in any other case of contract. Ordinarily the purchase price includes the consideration for the warranty. If the seller made the representations before the bargain was closed and the buyer purchased in reliance thereon, some of the purchase price is presumed to be given for the warranty, and how much is immaterial, since there is sufficient consideration to support the contract. If the buyer has relied upon the warranty and it was an inducement to the contract, it cannot be said that part of the purchase price is not given for it. But when the seller makes the representations after the sale has actually been made, then such statements amount to nothing and the seller cannot be held liable if they are untrue unless some new and distinct consideration is now given to support this new contract which was not included in the original purchase price.

131. **Opinion of seller.**—Ordinarily a buyer ought not to place reliance upon the seller's opinion with reference to the article. He is not here stating anything as a fact with reference to the qualities or

[15] Schlichting v. Rowell, 140 Iowa 731.

[16] Wolcott, Johnson & Co. v. Lewis D. Mount, 7 Vroom 262 (N. J.), LEADING ILLUSTRATIVE CASES.

characteristics of the goods, but merely his own judgment or opinion upon a question where the buyer may also form his own opinion. But if the seller is an expert and has special knowledge or skill with reference to a particular class of articles, his statement of his opinion may have great influence in inducing the buyer to purchase, and if the seller does not correctly state his opinion he is liable, if the buyer was reasonably led to rely upon it. Statements with reference to the value of an article are ordinarily mere opinion upon which the buyer places no reliance in making the bargain. The Sales Act[17] states what is considered to be the usual situation in this respect. It says: "No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only, shall be construed as a warranty."

132. **Seller's commendation.**—Much like the question of the seller's opinion is the matter of the seller's commendation of his own goods which he is offering for sale. Originally the seller was allowed to go very far in making statements as to the goods which he wished to sell without binding himself to a warranty by such statements, the reason given being that nobody believed the seller when he praised his own goods and no one relied thereon. At the present time, however, though we still recognize that some of the statements made by way of commendation are not meant as warranties, still whenever the seller's statements are so made as to matters of fact that the buyer might reasonably rely

[17] § 12.

thereon, such statements will be considered as warranties. But general expressions that the goods are "fine" or "nice" are to be treated rather as matters of opinion or as seller's praise of his wares, and are not to be relied upon as inducements to the contract.

133. **Obvious defects.**—In order to make out warranty it is necessary to show not only that the seller made representations with reference to the goods, but also that the buyer in purchasing acted in reliance thereon. Therefore, if the buyer knows of defects in the article and of the exact character and effect of such defects, he cannot be considered to have purchased in reliance upon the seller's statements or to have given any of the purchase price in consideration for the warranties. Thus, if the owner of a horse should warrant him to be sound in every way but it is perfectly apparent that the horse has only one eye and the purchaser has opportunity to observe this fact, he cannot complain of the defect after he has made the purchase. But if the exact nature and character of the defect is not apparent, then the buyer may rely upon the warranty if the defect is other or greater than it appeared on observation.[18] Thus, if a horse's eye appears sore, this may be something merely temporary which will not affect the value or usefulness of the animal, but on the other hand it may be of such a nature as to render the animal entirely worthless, or greatly reduce its value. Here, though the defect is patent, the exact nature and effect of it are

[18] Watson v. Roode, 30 Neb. 264, 46 N. W. 491, LEADING ILLUSTRATIVE CASES.

not, and the buyer cannot be said to have knowledge, and the very fact of the warranty given may be the one thing which induces him to purchase when he otherwise would not have done so because of his uncertainty as to the character of the defect.

134. **Future qualities or conditions.**—It is not necessary that the seller have knowledge concerning that which he warrants, nor is it necessary that the buyer should suppose that he has. If the seller wishes to take the risk as to future events about which he cannot have present information, there is no reason why he should not be allowed to do so just as much as he may warrant present conditions about which he may actually have no knowledge, nor is there any reason why the buyer should not be allowed to rely upon and purchase because of this warranty. The buyer may not wish to take the risk and perhaps would not purchase except for the seller's statements. A good illustration of such a warranty of future qualities or conditions is often found in the sale of young animals for breeding purposes where the qualities concerning which warranty is given cannot be determined until the maturity of the animal sold. If the seller is willing to take the risk and the buyer buys in reliance upon his so doing, the warranty is good and the seller may be held if it is broken.

135. **Sale by sample.**—When goods are sold by sample it is only another way of giving a description of the qualities which the bulk is represented to possess and such representations amount to a warranty that the bulk is like the sample; but if the

contract also describes the goods as having certain qualities and the sample does not possess these qualities it is understood that the goods are warranted to have these special qualities in addition to those of the sample. The Sales Act[19] states the law as it is understood even in the absence of statute. It provides that "In the case of a contract to sell or a sale by sample there is an implied warranty that the bulk shall correspond with the sample in quality," and it is further provided that "If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample." Though this warranty in sale by sample is here spoken of as an implied warranty, it really amounts only to another way of directly representing the qualities which the seller promises that the goods will have; it is a short way of describing the goods. But whether it is spoken of as express or implied is quite immaterial, since if it is but admitted that there is a warranty and the extent of the warranty is determined, the effect is exactly the same.[20]

[19] § 16.

[20] Bradford v. Manly, 13 Mass. 139, LEADING ILLUSTRATIVE CASES.

CHAPTER XVIII.

REMEDIES FOR BREACH OF WARRANTY.

136. **Remedies given.**—Since warranty is a matter of contract, if it is broken the buyer may recover damages therefor. The Sales Act[21] states the rule of damages as it has been fixed by the courts as follows: "The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty. In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty."

Many courts allow a further remedy to the buyer for breach of warranty, namely, to rescind the sale upon discovering the breach and throw the goods back upon the seller because they do not comply with the contract. Not all courts allow rescission, however, and many limit the buyer only to his action for damages.

137. **Acceptance of goods as affecting damages —Seller liable.**—Courts have differed considerably in their attitude as to the effect of acceptance or retention of the goods after knowledge of a breach

[21] § 69 (6) (7).

of warranty. Since warranty is treated as contract it would seem that the action for breach thereof would remain and not be affected in any way by the buyer's mere acceptance, so that he may keep the goods and recover damages for the warranty which is broken.[22] This is the view taken by most courts and this view is adopted by the Sales Act,[23] which provides that: "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale." But the Sales Act adds the qualification that "if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know, of such breach, the seller shall not be liable therefor." This qualification is not generally stated by the courts, though it has been adopted in a few cases.

138. **Same subject—Seller not liable.**—The courts which have taken the other view, i. e., that acceptance of the goods with knowledge of their defects constituted a defense to the seller in any action for damages for breach of warranty, have generally based their decisions upon some such reasoning as this: that the seller tendered the goods in full and complete satisfaction of the contract, and that the buyer by accepting them has assented to so taking them. This view seems to offer no protection to the

[22] Underwood v. Wolf, 131 Ill. 425, 23 N. E. 598, LEADING ILLUSTRATIVE CASES.

[23] § 49.

buyer, for it may often happen that his business requires that he take the goods offered in order to supply his customers, even though he knows they are not as warranted.

It seems unnecessary to go this far to protect a seller from a pretended claim on the part of the buyer for breach of warranty when called upon for payment. True, the fact that the buyer has accepted the goods without complaint, or has made no objection to the quality until asked for payment, may be some evidence upon the question of whether the warranty was in fact broken or not, and the seller should be allowed to show this to discredit the claim that the warranty was broken, but it seems unfair to hold that the mere acceptance of the goods without any other showing should preclude the buyer from recovering on breach of warranty. The provision of the Sales Act stated in the previous section, requiring the buyer to give notice within a reasonable time that the goods are not as warranted, would seem to give the seller sufficient protection without, at the same time, being too severe on the buyer. But as previously stated, except where the Sales Act has been adopted this limitation has not been placed by many courts.

139. **Rescission for breach of warranty.**—There is a very great division of authority in this country upon the question of allowing rescission as a remedy for breach of warranty. The nature of this relief in this class of cases is that if the goods do not correspond to the warranties given, upon discovering the breach the buyer may rescind the sale, that is, throw

the title back upon the seller, thus acquiring an entire defense to any action the seller might bring for the purchase price, or if the buyer has already paid for the goods, he may bring an action to recover back this sum.

Where this right is allowed it must be exercised by the buyer as soon as he has discovered, or has had reasonable opportunity to discover, the defects, and he must also be able to put the seller back into his original position by returning the property to him in as good condition as when he received it. Should the buyer do any acts with reference to the goods, after discovering the breach of warranty, which acts evidence an intention to use them as his own, or in fact do anything inconsistent with treating them only as the seller's property, he will have waived his right to rescission. Also, if the goods are destroyed so that the seller cannot be put back into his original position, the buyer cannot then rescind, even though he can prove that the warranties given were broken, and though the loss of the goods was without any fault on his part.

The remedy of rescission for breach of warranty works out justice as between the parties, since the buyer may not want the article at any price if it does not correspond to the warranties given, and it seems most unfair to him to make him take an inferior or defective article even though he may get it for a less price. Wherever the Sales Act[24] has been adopted, rescission, as a remedy for breach of warranty, is allowed; since it provides that in such

[24] § 69 (d).

case "the buyer may, at his election * * * rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid."

140. **Warranty distinguished from condition.**—In jurisdictions which do not allow the buyer to rescind for breach of warranty, thus throwing goods which are defective in quality back upon the seller, but require the buyer to keep the goods and bring action for damages, the hardship of this situation has induced many courts to call matters of description conditions rather than warranties. Thus, if A should order from B certain goods by description, allowing B to select goods corresponding to the description given, courts which allow rescission for breach of warranty have generally said that if B sends goods of the kind ordered but which do not entirely comply with the description as given him, there is a breach of warranty. But if rescission is not allowed, since A would be obliged to take the goods and bring action for damages, many courts, in order to avoid this hardship, have said that it was a condition of the seller's authority to select the goods for the contract that he should select goods corresponding to the description given, and if he has in any way failed to do so, then the condition upon which he was allowed to select goods and pass title thereto has not been performed, and consequently title has never passed and the buyer is not bound by the contract. This seems unnatural and

artificial when the goods depart but slightly from the description given in the buyer's order.

But even in the jurisdictions which do not allow rescission for breach of warranty, if the title has not as yet passed, i. e., if the sale is executory, the buyer may refuse to accept the goods if they do not correspond to the agreement made by the parties with reference to them. The statement of the Sales Act[25] on this point is in accordance with the rule of practically all the American cases whether allowing rescission for breach of warranty or not. It provides: "Where the property in the goods has not passed, the buyer may treat the fulfillment by the seller of his obligation to furnish goods as described and as warranted expressly or by implication in the contract to sell, as a condition of the obligation of the buyer to perform his promise to accept and pay for the goods." But if the title has actually passed, many courts hold that the buyer must keep the goods and sue for breach of warranty. In the attempt to prevent title from passing, so as to thus protect the buyer, some courts have improperly termed "conditions" that which in fact would naturally be called "warranties."

141. **Warranty distinguished from non-performance of contract.**—But a clear distinction should be made as to matters which might be treated as warranties in cases in which there is an entire failure to observe the terms of the contract, as where the seller sends an article of an entirely different character from that ordered. Thus, "if a man offers

[25] § 11 (2).

to buy peas of another, and he sends him beans, he does not perform his contract; but that is not a warranty; there is no warranty that he should sell him peas; the contract is to sell peas, and if he sells him anything else in their stead, it is a non-performance of it."[26] But if the parties should expressly state that the performance of certain acts or the furnishing of goods of a certain description should be a condition of the passing of title to the goods, then all courts would observe the contract which the parties had thus made,[27] and the non-performance of such condition would prevent any liability from being assumed by the buyer as much as in the case where an article of a different kind is sent. If the contract calls for an identified article, the parties mean to contract with reference to this particular thing, and this only, and the furnishing of such identified article is a condition precedent to any liability on the buyer's part. To furnish another article of the same kind and quality under the terms of such a bargain, would be as much a non-performance as if an article of an entirely different character were offered. "It would be very unfortunate if the distinction between conditions and promises should become obliterated, for the legal ideas are distinct and should have distinct names."[28]

[26] Chanter v. Hopkins, 4 M. & W. 399 (Eng.).
[27] Sales Act, § 11 (1).
[28] American Uniform Commercial Acts, p. 77.

CHAPTER XIX.

THE STATUTE OF FRAUDS.

142. **History of the Statute.**—In 1676 there was passed in England a statute[29] for the "prevention of many fraudulent practices which are commonly endeavored to be upheld by perjury," which is commonly known as the Statute of Frauds. Its object was to prevent fraud in the proof of certain classes of contracts by requiring written evidence in order to prove the same, thus making it more difficult for anyone, by false testimony, to fix a liability upon another. The seventeenth section of this Statute referred to contracts for the sale of goods. This section was as follows: "No contract for the sale of any goods, wares, and merchandise, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such a contract, or their agents thereunto authorized."

This Statute, either in its original or in some similar form, has been adopted in most of our states, and though these statutes vary in details, the general scope of them is much the same. The various

[29] 29 Car. II, c. 3.

provisions of the Statute will be discussed in the following sections.

143. **Contract of sale.**—It is important to notice that the Statute has reference not to sales so as to invalidate in any way a title which has passed, but only to contracts which look toward the actual passing of title at some future time, that is, contracts for the sale of goods.

One of the most difficult questions arising under the Statute is, What is meant by a contract of sale, i. e., does it make any difference whether the thing about which the contract is entered into is now in existence in its finished form or whether money or labor must be expended to put it into the form contemplated by the parties? There are three different views which have been worked out by various courts in reference to this problem. These views are generally spoken of as the English, the New York, and the Massachusetts rule.

144. **Same subject—English rule.**—The case of Lee v. Griffin[80] represents the present rule which is followed by the English courts. In this case a woman ordered two sets of artificial teeth to be specially made for her. After the sets of teeth were finished, but before they were fitted, the woman died, and the dentist brought action against her executor for the price. In giving the test as to whether such an agreement was for work and labor, or a contract for the sale of goods, Blackburn, J., said: "If the contract be such that, when carried out, it would result in the sale of a chattel, the party

[80] 1 Best & Smith 272 (Eng.).

cannot sue for work and labor; but, if the result of the contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered. * * * In the present case the contract was to deliver a thing which, when completed, would have resulted in the sale of a chattel; in other words, the substance of the contract was for goods sold and delivered. I do not think that the test to apply to these cases is whether the value of the work exceeds that of the material used in its execution." Though it is generally conceded that the English rule is the most logical and affords the most accurate test for deciding a particular case, it has not found much support in the United States; only one state, Missouri, seems to have followed it.

145. **Same subject—New York rule.**—In the case of Parsons v. Loucks,[31] there was an oral contract to manufacture and deliver a quantity of paper. In deciding that the Statute did not apply to such a case, Hunt, C., said: "The distinction is between the sale of goods in existence, at the time of making the contract, and an agreement to manufacture goods. The former is within the prohibition of the Statute. * * * The latter is not. * * * The Statute alludes to a sale of goods, assuming that the articles are already in existence." This rule does not furnish a satisfactory test for a great number of cases where it may be very difficult to determine whether the article is really in existence at the time the contract is made, even though work and labor may be

[31] 48 N. Y. 17.

necessary to put it into final form as contemplated by the contract, or whether so much is still to be done that it amounts in fact to a manufacturing of goods from the materials which enter into the final product, so that the goods contracted for cannot be said to be in existence at the time of the contract. Though its application may be doubtful in a particular case, the rule of the New York cases is that the mere fact that something still remains to be done to make the goods ready for delivery will not change the case from a contract of sale to a contract for work and labor. The New York rule is followed in a number of states.

146. **Same subject—Massachusetts rule.**—The rule most generally followed in this country is that known as the Massachusetts rule, as developed in the cases of that state. In the case of Mixer v. Howarth,[82] the plaintiff had on hand the body of a carriage nearly completed, which he finished according to special directions given by the defendant. Shaw, C. J., in delivering the opinion of the court that this was not a sale as contemplated by the Statute of Frauds, said: "When the contract is a contract of sale, either of an article then existing, or of articles which the vendor usually has for sale in the course of his business, the Statute applies to the contract, as well where it is to be executed at a future time, as where it is to be executed immediately. But where it is an agreement with a workman, to put materials together and construct an article for the employer * * * it is not a sale

[82] 21 Pick. 205 (Mass.).

until an actual or constructive delivery and acceptance." The same distinction was more clearly stated by Ames, J., in Goddard v. Binney,[33] as follows: "A contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or produces for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the Statute applies. But on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order and not for the general market, the case is not within the Statute."

147. **Same subject—Sales Act.**—The Massachusetts rule has had the largest following in this country and has been adopted in the Sales Act[34] in the following terms: "The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply."

148. **Goods, wares and merchandise.**—In general, in this country, the wording of the Statute, "goods, wares, and merchandise," has been held to be prac-

[33] 115 Mass. 450, LEADING ILLUSTRATIVE CASES.
[34] § 4 (2).

tically synonymous with the term "personal property." It has been held that the terms include choses in action, shares of stock, bonds, commercial paper, and other evidences of right, or indicia of property, though the English and some of the American jurisdictions have not always so held.

The question often arises as to whether a particular contract, for example, one for the sale of trees, crops, or minerals, is for the sale of lands, and therefore governed by the fourth section of the Statute, or whether it is controlled by the provisions of the seventeenth section under the wording "goods, wares and merchandise."

149. **Same subject—Growing crops.**—A distinction is made between crops which may be naturally produced year after year without annual cultivation and those which must be sown annually, the first called *fructus naturales* (fruits produced by nature), and the second *fructus industriales* (fruits produced by cultivation). That which is considered fructus naturales is treated as real estate and hence not within the seventeenth section of the Statute. Thus, trees, grass, certain kinds of fruits, etc., are within this description. With reference to fruits, however, it has been held by a number of courts that even though annual planting be not required, if cultivation each year is necessary to produce a crop, it should be classed as fructus industriales and hence within the seventeenth section of the Statute. Thus in Purner v. Piercy,[85] where the contract was for the sale and purchase of a crop of peaches, the defendant to

[85] 40 Md. 212; see subject, CONTRACTS.

gather and remove them as they matured, it was held that "a growing crop of peaches or other fruit, requiring periodical expense, industry and attention, in its yield and production, may be well classed as fructus industriales." The same has been held in other jurisdictions with reference to apples, blackberries, grapes and other fruit.

With reference to those things which are clearly annual crops, dependent upon annual planting and cultivation, the courts all hold such, as fructus industriales, to be personal property whether matured or not and hence within the description of "goods."

150. **Same subject—Trees; minerals.**—Growing trees are generally considered a part of the realty,[36] and hence a contract with reference thereto must comply with the provisions of the fourth section of the Statute, that relating to sales or transfers of interest in lands. But the distinction has been made by some courts between sales of timber where the immediate removal of the same is contemplated by the bargain, and sales where the timber is to derive some further benefit from the soil. Many courts have held that in the first case, this should be treated as a sale of goods and not of an interest in lands, and hence should be considered as within the seventeenth section of the Statute; but by the weight of authority in this country, it is still held to be a bargain concerning an interest in lands regardless of when the parties intend that a severance should take place. If, however, the owner of the land should bargain

[36] Hirth v. Graham, 50 Oh. St. 57, 33 N. E. 90, LEADING ILLUSTRATIVE CASES.

to cut the timber and then sell it after it is cut, this does not contemplate giving the buyer any present interest in the thing, but is a bargain to sell a thing only after it becomes a chattel, and hence cannot be considered as a contract concerning an interest in lands.

With reference to minerals, they are clearly a part of the land, and any bargain which contemplates giving a present interest therein before they are mined or leaves it to the vendee to make the severance, is an interest in realty. But, as in the case of trees, if the owner is to sever and then transfer the property to the buyer, such a bargain is one for the sale of goods and is within the seventeenth section.

151. **The Price.**—In the original Statute of Frauds, the price fixed which should bring a case within its operation was ten pounds. The sums most commonly fixed by the American statutes are either ten dollars or the substantial equivalent of the sum fixed in the English statute, i. e., fifty dollars, while others have no sum named, and still others a very large amount. In the Sales Act[37] the sum of $500 is given, thus taking the smaller transactions out of the operation of the Statute.

When no price is fixed by the parties, if the reasonable value of the goods is above the amount named in the Statute, the case is within it. And so, if the amount cannot be ascertained until a later time, where it is dependent upon quantities or qualities which are at the time unknown, the value as it

[37] § 4 (1).

actually turns out to be will determine whether or not the case is within the Statute. Where various articles are sold at the same time or where the total price to be paid exceeds the sum fixed by the Statute, the case will come within its terms.[38] When the bargain includes many separate articles each below the sum fixed by the Statute, even though a separate price is named for each, whether the case is within the Statute or not will depend upon whether the contract may fairly be considered as one entire transaction, or as so many separate and distinct bargains.

152. **Effect of Statute on the contract.**—Though the English statute said that no contract "shall be allowed to be good" unless it complied with the provisions stated, this has not been interpreted as meaning that the contract was void, but merely that it was unenforcible, and this is the interpretation generally given to this or similar expressions used in the American statutes. Some few states, however, have changed the wording so as to declare the contract void unless in compliance with the provisions of the statute. In the Sales Act[39] the usual interpretation of the English statute is clearly presented by stating that the contract "shall not be enforcible, by action." If the contract is merely unenforcible then subsequent compliance with the Statute will make it enforcible, and since it is a right existing as between the parties, whether enforcible or not, it may be made the basis of further contract between them, while if it is actually void, there will be noth-

[38] Baldey v. Parker, 2 B. & C. 37 (Eng.).
[39] § 4 (1).

ing which can be revived by subsequent action or be the subject of further agreement.

153. **Acceptance and receipt.**—The Statute requires that the "buyer shall accept part of the goods so sold, and actually receive the same" if the oral contract is to be binding. Blackburn says:[40] "It seems that this provision is not complied with unless the two things concur; the buyer must accept, and he must actually receive part of the goods; and the contract will not be good unless he does both. And this is to be borne in mind, for as there may be an actual receipt without acceptance, so may there be an acceptance without any receipt." To prove acceptance by the buyer it must be shown that he has agreed to take the goods contracted for as being in compliance with the contract. This may be made out from his conduct by showing that he has acted with reference to the goods in a way which is inconsistent with anything other than acceptance, as by acting as if he were owner thereof or otherwise showing by his conduct that he is satisfied with the goods as fulfilling the contract.

But the mere fact of the receipt of the goods does not in any way signify an intention to accept the same. Thus, the carrier is in most cases considered as the agent of the buyer for the purpose of carrying the goods and therefore is agent to receive them; but it is not, unless specially authorized, agent to accept and the buyer may reject the goods even after they have been delivered to him. Nor is it material that the buyer has acted unreasonably in refusing the

[40] Blackburn, Sales, p. 17.

goods, for the Statute simply requires that the buyer accept, and not that he ought to accept, and hence the buyer's refusal may be entirely unreasonable, yet, if he does not accept, he cannot be held on the contract unless it complies in some other way with the Statute.

If the goods are in the buyer's possession at the time of the bargain, he has already actually received the same, and nothing further is necessary to show receipt. But if the goods remain in the seller's possession or in the possession of some third person there may still be actual receipt if it can be clearly shown that the seller or his agent acting for him has given up all right to the goods as owner or seller, and has agreed to assume the position of bailee of the buyer as the new owner thereof. The provision requiring both acceptance and actual receipt has been generally followed in this country and is required by the Sales Act.[41]

154. **Earnest money or part payment.**—Another method stated in the Statute by which the contract will be made enforcible is to "give something in earnest to bind the bargain or in part of payment," and this provision is also followed in the Sales Act.[42] This requirement is another way of safeguarding the transaction so as to prevent a bargain from being established by fraud or false testimony, for the thing given in earnest or by way of part payment furnishes good evidence of the bargain. Though money is usually given "to bind the bargain," the provision of

[41] § 4 (1).
[42] § 4 (1).

the Statute does not require this, but anything may be given over as an evidence of the agreement, and its value, whether great or small, is immaterial, so long as it has some value, since its object is merely to furnish proof of the bargain. Practically, at the present time, money is always given to bind the bargain and is treated as part payment, but there seems no reason for interpreting the Statute as requiring the payment of money. But the mere deposit of money with a third person as security for the performance of the contract, to be forfeited on nonperformance, is not sufficient, for it does not come within the terms of the Statute unless such party has been made the seller's agent to receive payment for him. It must be actually given, and retained by the seller or his agent acting for him, in order to be effective so as to make the contract enforcible. The terms "something in earnest," or "in part of payment" have generally been treated as synonymous, so that whatever has been received is to be applied upon the purchase price, rather than being in addition to it.

As to what may constitute a part payment, it is generally agreed that there must be something passed between the parties, and that mere words or new agreements will not suffice. Thus a mere promise to pay, as evidenced by the buyer's own note, is not sufficient unless it is intended by the parties as absolute payment and so accepted, which is not generally the understanding of the parties; but if the note is negotiated by the seller, this clearly constitutes part payment. The giving of a check, where

there are funds to meet the same, is regarded as part payment.

The mere agreement to set off the debt due for the sale of goods against other indebtedness existing between the same parties is held not to satisfy the Statute, even though this does amount to a cancellation of the former indebtedness at law. This is merely another oral agreement and does not constitute a part payment unless some further act is done by the parties to actually cancel, then and there, the old indebtedness.

155. **The writing required.**—Another method provided by the Statute to make the contract enforcible is "that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract," and this provision is adopted in practically all statutes in almost identical terms. Further, the provision with reference to a writing has in general been repeated in the same terms in other provisions of the Statute, and hence decisions as to what constitutes a sufficient note or memorandum in other cases are applicable to cases under the seventeenth section. It should be noticed that the Statute does not require that the contract itself should be in writing but it refers specially to oral contracts and merely requires that there be "some note or memorandum thereof." The important thing therefore is to determine what will constitute a sufficient note or memorandum.

Of course there can be no question when the full contract is in writing, but much less will suffice so long as all the essential terms of the bargain are

clearly set forth. The writing should show not only the names of all the parties to the transaction, but also their position in the bargain, whether as buyer or seller, the goods which are the subject matter of the bargain and the price to be paid if this has been definitely agreed upon, together with the terms of payment.[48] Parol evidence will not be allowed to supply deficiencies in the memorandum, but the defendant may introduce evidence to show that the note or memorandum is not complete and does not set forth all the terms of the bargain. The writing may be a very informal one, not intended by the parties as evidence of the contract or for the purpose of satisfying the Statute, but this is immaterial so long as it states the essential terms of the contract so as to amount to an accurate note which will show the bargain made between the parties. Such "note or memorandum" may consist of letters, telegrams, entries in account books, etc. Nor need the note or memorandum be contained in one document alone, but it is sufficient if numerous papers are so connected physically or so refer one to another that, taken together, the whole bargain may properly be made out. Thus the envelope in which a letter was contained may be used to show the name of the party to whom it was addressed, when this name did not appear in the letter itself.

156. **Time when memorandum made.**—The writing used to prove the contract may have been made at any time before action has been brought on the contract. Thus, a written offer, containing the es-

[48] Waterman v. Meigs, 4 Cush. 497 (Mass.), LEADING ILLUSTRATIVE CASES.

sential terms of the agreement, orally accepted, is sufficient, even though when it was written there was no contract as yet made. Also the writing may be made long after the bargain, and it has been held that a letter setting forth the contract and stating that the writer did not intend to be bound thereby, could nevertheless be used. But as the Statute requires some writing in order that the contract be enforcible, such writing must exist before action is brought, and if made afterwards, will not suffice in that proceeding. "There is no actionable contract before memorandum obtained. The contract cannot be sued upon until it has been legally verified in writing; until then there is no cause of action although there is a contract. The writing is a condition precedent to the right to sue."[44]

The contract takes effect as of the date when made and not as of the date when the memorandum or other requirement has been complied with.

157. **Signature.**—In its original form, and as generally adopted, the Statute only requires that the writing be signed and does not require that it be subscribed. Therefore, the writer's name anywhere appearing, placed there by him or with his consent as his signature, constitutes a signing. But where the terms of the Statute have been changed to demand that the writing be subscribed, this can be satisfied by nothing less than having the name written under the terms of the agreement.

The form of the signature is also quite immaterial. It does not need to be written, but may be printed

[44] Bird v. Munroe, 66 Me. 337.

or stamped, or it may consist of a mark or any device which the party has adopted in the particular case as his signature. The name may be written by another, and this will suffice if adopted by the one sought to be held on the contract. And special provision is made in the Statute so as to include a signature made by a party's duly authorized agent and such signature would not need to be shown to have been later adopted or approved by the principal.

158. **The party to be charged.**—It is not necessary that the note or memorandum be signed by both parties but merely that the one who is made defendant in an action on the particular contract can be shown to have signed a sufficient note or memorandum. Thus it often happens that the contract may be enforcible on one side and not on the other, since it is only the signature of the "party sought to be charged" which is required. Even though the writing has been sent by a man to his own agent or to any third person, and was not intended by him as evidence of the contract, it may be used to prove his contract, and though he retains in his own possession such note or memorandum, it has generally been held that such writing, if proved, is sufficient to satisfy the Statute with reference to contracts concerning personal property, though it has sometimes been held that such undelivered memorandum would not suffice in case of contracts concerning land.

159. **In general with reference to the Statute.**—It is to be borne in mind that the Statute contemplates that an oral contract for the sale of personal prop-

erty is perfectly good and valid in every way, but that it places certain requirements with reference to enforcement in the courts under certain circumstances, by requiring that certain things be done, such as making part payment, or receiving and accepting the goods, or making certain writings setting forth the terms of the bargain. These provisions all refer to the enforcement of the contract in the courts, and do not in any way concern its validity, and the two things are in fact very different and should always be distinguished.

BIBLIOGRAPHY.

Williston on Sales; *Mechem* on Sales; *Benjamin* on Sales (7th Amer. ed., edited by E. H. Bennett); *Burdick* on Sales (2d ed.); *Tiffany* on Sales (2d ed).

QUIZ QUESTIONS

PERSONAL PROPERTY AND BAILMENTS

(The numbers refer to the numbered sections in the text.)

1. What are the two branches of property law?
2. (a) What is the distinction between real and personal property? (b) What are *fructus naturales* and *fructus industriales?* (c) Are the following classed as real or personal property: (1) A lease of a lot and a building for ninety-nine years; (2) A certificate of stock in a company owning land; (3) An annuity to A and his heirs; (4) The trees, fences and buildings on a farm; (5) Growing crops and fruit; (6) A promissory note; (7) Fish in a pond; (8) Ice?
3. What is the reason of the divergence in the law of real and personal property?
4. What is the difference between choses in action and choses in possession? Give examples.
5. Classify the different modes of acquiring title to personal property.
6. The crew of the ship "Rainbow" raised and made fast to a whale in the North Sea, but he escaped, dragging the iron and line, and so far outran his pursuers that the boat's crew of the "Hercules" did not know that any one had attacked or was pursuing the whale when they met and captured him. The master of the "Rainbow" was in fact pursuing; he came up before the whale had rolled over, and said that one of his irons would be found in it, which proved to be true, and he thereupon took the prize. Assuming that there was a reasonable probability that the whale would have been captured by the "Rainbow," if

the boats of the Hercules had not come up, which ship is entitled to the whale?

7. Pierson had captured a live fox, but it escaped from the enclosure. He pursued it with his dogs and would soon have succeeded in taking the animal, but Post intercepted it in sight of Pierson and carried it off. Who is entitled to the fox?
8. Who has title, (a) if A starts game on the land of B, and takes and kills it there; (b) if A starts game on the land of B and takes and kills it on the land of C; (c) if A starts game on his own land and kills it on the land of B; (d) if A starts game on the land of B and kills it on his own land?
9. Suppose A has surrounded fish in a net in B's pond, and C takes the fish therefrom; can A sue C?
10. Would it affect the above case if the fish were caught in violation of game laws, or without a fishing license?
11. What is the distinction between lost and abandoned chattels?
12. A sheep belonging to a person unknown was found on the highway by A, who carried it to his house, and tied it with a cord. The sheep broke the cord and went back to the highway, where it was found next day by B, who took it and put it in his fold. A, seeing it there, demanded it. B asked him if it belonged to him. A replied that he did not know the owner, but that he himself had found it the day before. B refusing to give the sheep up, A took it out of the fold and carried it home. Can B sue A?
13. (a) A, the conductor of an electric car owned by the X company, while performing his duties as a conductor, found a pocketbook containing $100, which a passenger had left on one of the seats. The X company demanded it of A, who refused to give it up. May the X company recover the pocketbook or its value from A? (b) To whom would an irregularly-shaped mass of iron, formerly belonging to the Indians and worshipped by them as a medicine rock, belong, if found by you many years afterward on the land of another person where the Indians had abandoned it? (c) Two boys unearthed on defendant's premises an old can containing gold coin to the value of $7,000.

Upon learning of the find, the defendant compelled the boys to deliver the money to him on the ground that he had the better right to it as owner of the premises where it was found. Can the boys recover possession in a proper action?

14. (a) What is the distinction between property lost and mislaid? (b) One Hoagland visited the Forest Park Highlands, a place of amusement in the city of St. Louis. He sat down at one of the tables which were scattered about the grounds, when he found a pocketbook lying on the ground. The manager demanded the pocketbook as property inadvertently mislaid by the loser, and on Hoagland's refusal to deliver it up, ejected him from the premises. Who was entitled to possession of the pocketbook? (94 Am. St. Rep. 741.)

15. (a) Trover is brought for a $50 bill.—Defendant, a dealer in junk, bought an old iron safe, paying for it by the pound. He turned it over to plaintiff, an employe, with instructions to take out the compartments and other removable parts. Plaintiff discovered in a crack in the lining of the safe a $50 bill. He gave it to the defendant and asked him if it were genuine. Defendant said he would take it to a bank and see. It was found to be genuine and the defendant refused to give it back on demand. Plaintiff sues him in trover. Can he recover the money? (b) Some coins are found in a crack in the floor of a building by a tenant; can the owner recover possession on the ground of ownership of the premises?

17. What is the justice or policy of recognizing title by adverse possession?

18. (a) What are the requisites of adverse possession? (b) Can a thief who holds possession secretly for the statutory period acquire title in this way?

19. B, in 1880, converted a mare, the property of A. In 1883, the mare had a foal, which, in 1884, B sold to C, and which, in 1887, A found on the highway, and refused on C's demand to give up to him. C, in 1888, brought trover against A. Can it be maintained? It is to be assumed that by the Statute of Limitations six years is a bar to an action of trover or replevin.

20. (a) Does the Statute of Limitations transfer or merely quiet title? (b) A, to whom I have loaned my horse in New York, takes the animal to Oklahoma and keeps him there in open and notorious possession for four years; he then sells him to B, who has no knowledge of my claim, and who keeps him for a year more in Kansas, when he brings him to New York and I take possession of him. Assuming the period of limitation on actions to recover possession of personal property, or its value, to be five years in Oklahoma and Kansas, and six years in New York, was I justified in retaking the horse?

21-22. (a) Y delivered a trunk to one Sawin to carry from Boston to Cambridge. Sawin loses it. Y sues Sawin in assumpsit and recovers $120 damages, which Sawin pays. Y afterwards, not through Sawin, but through the police, recovers the trunk, which has remained unbroken. Sawin, learning of this, demands the trunk. Y refuses to give it up to him, but tenders back the $120, which Sawin refuses to accept. Can Sawin replevy the trunk? (b) A's dogcart was converted by B, who sold it to C. A brought trover against B, recovered judgment for the full value, and directed the sheriff to levy the execution upon the dogcart, and sell it. The sheriff levied upon the dogcart, advertising it for sale, but before the sale C took it from him on a writ of replevin. In the replevin suit of C against the sheriff, for whom should there be judgment? (c) B stole A's horse and sold it to C, a bona fide purchaser. D stole it from C. C brought trover against D, recovered judgment, and D satisfied the judgment. Can A now maintain trover against D?

23-24. What is the extent of protection to an author's productions at common law?

25. Is the presentation of a play, or the public reading of a poem, a publication which will terminate literary property at common law?

26. Hoyt had written confidential letters to McKenzie, which McKenzie on a misunderstanding between himself and his friend undertook to publish. Hoyt brings a bill for an injunction to restrain publication. McKenzie makes two defenses: (a) That the receiver of a letter has exclusive

property in it; (b) that these were letters of friendship and had no value as literary property. Were either of these defenses good?

27. What is the policy of copyright statutes?

28-30. Are trademarks, inventions, good will and trade secrets recognized as property at common law?

31-32. Give instances of the application of the maxim that "an accession falls to the principal."

33-34. (a) What is the basis of title by accession? (b) What is the supposed dilemma in which the courts find themselves?

35-36. What is the so-called "change of species" test in accession?

37-38. A by mistake entered upon B's land and there cut down trees, and made them into railroad ties worth ten times the original value of the standing timber. A then sold the ties to C, a bona fide purchaser for value. Can B recover from C the ties or their value?

39. A owned a large tract of land covered by swamp and wild grass. He was making no present use of the land, holding it for investment only. B owned adjoining land, and by mistake cut a quantity of grass on A's land. The grass was worth, after severance, six times as much as when growing. B was about to cure it and bale it as hay when A seized it and claimed it as his own. B sues A for compensation for the value which he has added to the hay. Can he recover?

40. (a) A brings an action of replevin against B to recover possession of 100,000 bricks of the value of $7 per thousand, manufactured from clay belonging to the plaintiff A, on the ground that defendant B willfully appropriated said clay. X, claiming to be the owner of certain real estate, had leased it to B for the manufacture of brick. B commenced to manufacture brick thereon, but afterwards was notified by A that he claimed the land as his and that B must stop work, which B did not do. It appeared that X had an action then pending for the specific performance of an alleged contract for the land, and the bricks in dispute were all made while that action was

pending. The nature of X's claim does not appear, but judgment was finally rendered against him. In a replevin suit, judgment for whom? (b) A chance passerby finds a bear trap set on public land, but springs it, moves the trap a little way and resets it. The next night a bear is caught in the trap. To whom does it belong?

41. A cuts trees on what he knows to be B's land, and works the lumber up into boxes. The material can be traced into the boxes, but it is increased thirty-fold in value. The boxes were sold to X, who knows nothing of their history. Against whom can B bring trover and what will the damages in trover be?

42-44. Give an example of confusion of goods which is accidental or by consent. What is the result on the title?

45. A and B own adjoining wood lots. The timber standing on A's lot was worth $1,000; that on B's lot was worth $2,000. B cut all the timber on both lots. In cutting half of A's timber, B was conscious that he was trespassing; in cutting the other half, he was not so conscious. The timber was doubled in value by being cut. It was of similar quality, and was mixed together so that it was not possible to say which was from A's land and which was from B's land. B converted the timber into shingles which were worth $12,000. B sold $2,000 worth of the shingles to C, who believed B had a right to sell them and paid B for them. A brings trover against C. What judgment?

46-47. If one wrongfully empties another's bottle of fine wine into a hogshead or vat of his own wine of inferior quality, shall the bottle owner take the whole without allowance to the confuser?

48. (a) What are the remedies of A at the different stages of the case mentioned in No. 45? Suppose A delayed claiming his share of the timber when he knew that B was about to convert it into shingles. (b) A through mistake has cut wood on B's land and mingled it with wood cut on his own land. B has taken possession of the whole. What advice would you give A as to the remedies open to him? (c) If a natural gas company fraudulently commingles its gas with gas from the well of another under its con-

trol, keeping no account thereof, can it claim any part of the mixture or the proceeds thereof?

49. Compare the rules as to confusion and accession.

50-52. What is the rule as to tracing mingled funds as against a trustee?

53. What is the rule as to tracing mingled funds into an insolvent estate as against general creditors?

54. What is the rule as between innocent contributors as to tracing moneys mingled in a common fund from which there have been withdrawals made?

55-56. Define a gift and mention the essential elements of a gift.

57. May a gift be made by written instrument without delivery?

58. X and Y were friends rooming in the same house. X had a note of a third party for $100.00 payable to him or order. One night X, without consulting Y, placed it in an envelope addressed to Y and shot himself. Y, hearing the shot, came in and saw X lying on the floor, unconscious but still breathing. X died within five minutes, but before the death occurred, Y had seen the envelope addressed to him and had placed it in his pocket. Is this a valid gift?

59. (a) A was the owner of two promissory notes of $50.00 each made by a third party payable to bearer. He gave them to B, his nephew, to be placed in a safe in B's store for safe-keeping. Later B asked A for a loan of $100.00. A replied: "I won't loan you anything, but you may have the two notes you have been keeping for me." Is this a sufficient delivery? (b) One Devol, about to die, intrusted the keys to his box and private drawer of the safe of the bank of which he had been president to Mr. Lane. In the box and private drawer were stocks, bonds, money and other valuables. He instructed Mr. Lane to make up separate packages for various donees to be delivered to them in the event of the donor's death. Lane retained the keys and Devol never again took possession of the keys, although the money was permitted to remain in the donor's box until his death. The donees never knew of the intended gift. Was there a sufficient delivery?

60. How may a gift be made without delivery?

61. A, in expectation of death, delivered to her niece the key of a trunk containing a savings bank book, intending thereby to give the deposit to the niece. The trunk also contained other property, including several pass books. The niece obtained possession of the savings bank book, though this was never known to the donor. Was there a sufficient delivery, whether actual or constructive? (15 Harv. Law Rev. 751.)

62. (a) Is there any difference between the gift of one's own check or promissory note and the gift of a certificate of deposit in a bank? (b) A mother, having received life insurance money on the death of her husband, deposited the money in the defendant bank for her minor children, and took certificates of deposit, which were given to T, their so-called "guardian," payable to them or guardian. Was this a valid gift of the deposit? (c) Would the result have been different if the mother had taken certificates payable to the children or herself, and had herself held the certificates? Would that have amounted to a delivery or a complete gift of the bank deposit?

63-64. (a) How does a gift causa mortis differ from a gift inter vivos? (b) Mrs. Knight, an invalid woman, about to undergo a surgical operation, made an absolute, voluntary assignment of all of her property to a stranger. Is this a valid gift, either inter vivos or causa mortis? Which is it, presumably? (c) A made an entry in his savings bank book, "In case of my death, payable to B," delivered the book to B, and subsequently died. Can B collect the deposit?

65. Is a gift to an attorney by a client presumptively induced by fraud or undue influence?

66-68. What is the scope of the law of bailments?

69. How does bailment arise?

70. B went to A's store to buy a suit. The clerk told B to look over coats which were piled on a table, while he finished waiting on another customer. B took off his coat and vest, placed them on the table and tried on a number of coats. The floorwalker and other clerks were near, but the detective usually on the floor was out. Finally, the clerk came over and B said he had selected

his suit. When he picked up his own coat and vest, his watch and pocketbook were missing. B sues the proprietor of the store for the loss. May he recover?

71-72. Is the holding of goods by a thief, converter, clerk or servant the possession of a bailee?

73. A was accustomed to take the milk of patrons and manufacture it into butter and cheese, market the product, deposit the proceeds and take for himself two cents for every pound sold, dividing the balance among his patrons in proportion to the amount of milk furnished by each. Being indebted to B, he assigned to him, as security for his personal debt, all the butter in his factory. What are the rights of X, Y and Z, who had furnished the milk from which the butter was made, as against either A or B?

74. On January 2, A deposited in a grain elevator owned by B, 1,000 bushels of wheat, and took a receipt in this form: "Received in store for and on account of A, 1,000 bushels of wheat, loss by fire at owner's risk. Wheat may be stored with other wheat of the same quality." The wheat was placed in a bin with wheat belonging to other persons and to B. The wheat was gradually drawn out of this bin by B without the bin being filled up, until January 27, when the bin was empty. B began on January 29, to fill up the bin again, and on February 8, it was as full as when A's wheat was first deposited. On February 11, the elevator was burned without B's fault. A brings trover to recover for the value of the wheat. On these facts, can he recover?

75. X deposits grain in Y's elevator and receives a receipt which calls on Y to deliver on presentation either grain of the same kind and quality, or the market price of the grain. In case of fire, does the loss fall on X or Y? Suppose the receipt gives X the option to call either for grain or the market price thereof.

76. Describe a consignment as contrasted with a sale.

77-78. I lease my house furnished to A for a year. Before the term has expired, the piano is injured by A's children; some chairs are broken up by him in beating his wife; the rest of the furniture is seized by the sheriff upon an execution against A. I bring trespass against A

for the piano and chairs. I bring trover against the sheriff for his wrongful seizure of my goods. Can these actions be maintained? If not, what remedies have I at common law?

79. I hire an automobile at the garage for an hour. B, in another auto, negligently runs into me and damages my hired machine to the extent of $300.00. I am not responsible to the garage. Can I sue B for the $300.00?

80. X ships goods by a railroad to himself at Z. At the destination, while the railroad is holding the goods under a lien for charges, the goods are seized by the sheriff on execution as the property of Y, and the railroad surrenders possession. Can X sue the sheriff in trover or only in case?

81. When is a demand necessary in order to sue a bailee in trover?

82. A pledged his watch to B with authority to sell it upon notice if it was not redeemed on January 1, 1894. On December 23, 1893, the debt not having been paid, B, having a good opportunity to sell the watch, did so for a fair price, but not for enough to pay the debt. A brought trover for conversion of the watch. Could he recover (1) the value of the watch? (2) nominal damages? (3) nothing? State as briefly as possible the reason for each recovery, and which you prefer.

83. Are the duties of the bailee to the bailor founded in tort or in contract or otherwise?

84. What is the duty of a livery-stable keeper to one who hires a rig for a trip over a rough, dangerous road?

85. (a) State the main classes of bailments and the sub-classes thereof. (b) What is a deposit, a mandate, a commodatum? (c) Mention five different species of bailment for hire.

86. (a) What is the measure of diligence exacted from a depositary? (b) Suppose a finder should leave a pocketbook filled with bills which he had found, in his overcoat hung up in a public place and it was stolen, would he be responsible therefor to the loser?

87. What was the holding in the case of Coggs v. Bernard?

88. What degree of diligence is exacted from a borrower of goods?

89. A leaves a suit with B, a dealer, to be cleaned and pressed. Two days later, A is advised by B that, after cleaning and pressing the suit, his shop and its contents were destroyed by fire. A bill for two dollars for services was enclosed by B. Is B liable to A for the loss of the suit?

90. A hired a horse from B on condition that it should be returned on one day's notice in the same condition as when received. The horse, while being used for a different purpose than that for which it was hired, fell and broke its leg, without fault on the part of the hirer. Is the hirer liable? Why?

91. What is the effect of a special promise to return property in the same condition as when received?

92. When may bailee deny the bailor's title?

93. A let a team of horses in a sound condition to B. They are returned lame. The hirer gives no explanation as to how the injury occurred. Is there a presumption that they were improperly used? Is the burden of proof to disprove negligence upon the bailee, or upon the bailor to prove negligence?

94-95. What is the foundation of the liability of a common carrier?

96. What is the foundation of an innkeeper's liability?

97-98. (a) What are two different views as to the proper measure of the innkeeper's liability at the present day? (b) I stop at a hotel; a fire occurs in the night and although I manage to escape, my clothes and valuables are destroyed in my room. Is the hotel keeper liable?

99. Who is an innkeeper and when does the relation of innkeeper and guest arise?

100. What are the liabilities of innkeepers and restaurant keepers for apparel stolen from a dining room?

101. For what goods is the innkeeper liable?

102. (a) Action by a boarder against a boarding-house keeper for the loss of wearing apparel, jewels, and ornaments.—It appears that the plaintiff locked the door of his room upon leaving it and placed the key under the carpet in the hall, as he had been requested to do by the chamber-

maid. There was but one key to each room, and the chambermaid, not having pass keys, was obliged to use plaintiff's key. The custom was for the boarders upon leaving their rooms and locking their doors, to put their keys under the carpet of the hall so that the chambermaid could find them and get into the rooms for the purpose of putting them in order. While plaintiff was absent from the room, someone entered it and stole his personal effects. Should plaintiff succeed? (b) What would be the effect of a notice posted in the office of the hotel or boarding house requiring boarders to deposit their jewels and ornaments in the office safe?

103. (a) When does an innkeeper's liability terminate? (b) A went to a hotel taking with her $5,000 in jewelry and clothing valued at $1,000. She placed the jewelry under her pillow. At noon the next day, A packed the clothes and jewelry in her trunk, paid her bill, and left orders to the clerk to deliver her trunk to a drayman who would call at 5 o'clock. At 3 o'clock the hotel burned. A sues to recover. What are her rights?

QUIZ QUESTIONS

LAW OF LIENS AND PLEDGES

(*The numbers refer to the numbered sections in the text.*)

1. (a) What is a lien? (b) What advantage does a lien give the lien holder?
2. (a) Define a pledge. (b) What are the chief differences between pledges and other liens?
3. Distinguish liens and mortgages.
4. (a) How are liens created? (b) Is contractual capacity necessary in the parties?
5. To what property may liens attach?
6. (a) What is meant by the statement that liens are accessory rights? (b) Give an example of a lien which does not secure a personal obligation.
7. A brings a pair of shoes to X, to be repaired. X's charges are 50 cents and the law gives him a lien on the shoes as security. A few days earlier A had borrowed $1.00 from X. Can X hold the shoes for the $1.50?

8-9. (a) Give several principles by which liens are classified. (b) What is the difference between general and specific liens?

10. What are the chief characteristics of common law liens?
11. Name the different classes of common law liens.
12. (a) Why are liens given to persons engaged in public callings? (b) Goods are given by A to the X express company to transport. A on a former occasion shipped goods by the X company and his agent received them without paying the charges. Can the X company now hold the goods in its possession for the charges on both consignments?
13. (a) To what property does an innkeeper's lien attach and

for what charges may it be held? (b) Are boarding and lodging house keepers entitled to similar liens?

14. A takes his horse to X to be shod and then wishes to take him away without paying the charges. Is X justified in holding the horse until he is paid for his services? Why?
15. A takes his horse to X's livery stable and leaves him there for a week. X cares for and feeds him and when A returns and demands his horse X refuses to give him up until paid his charges. Has X a right to do so?
16. X finds a tub of butter on the road. He puts it in cold storage and inserts a notice in the newspaper saying he will deliver it to the owner upon payment of the expenses to which he has been put. A, the owner, sees the notice and demands his butter, refusing to pay X's expenses. Has X a right to hold the butter until payment of his expenses?
17. A loses a watch and offers a reward of $10 for its return. X finds the watch and tells A that he will give it to him upon payment of the reward offered. If A refuses to pay, has X a right to withhold the watch?
18. (a) A sends a carload of potatoes to X, a commission merchant, to sell. On a previous occasion X had sold some corn for A. Has X a lien on the potatoes for his commission in selling the corn? (b) A leaves some shares of stock with a bank for safe-keeping. Later A borrows $1000 from the bank secured only by his personal note. Has the bank a right to hold the shares until the note is paid?
19. A brings a deed to X, a lawyer, and asks his legal opinion in regard to certain clauses in it. Later A has X bring a suit for personal injuries in his behalf, which turns out unfavorably to A. A refuses to pay X anything. Has X a right to hold the deed until the charges for his services are paid?
20. (a) Why does an attachment not give a lien in the strict sense? In what respects does it confer an advantage similar to that of a lien? (b) Explain a judgment lien.
21. X sells A a horse to be paid for one month from the date of sale. The next day, before X has delivered the horse to A, he finds out that A is insolvent. Has X the right to refuse to give up the horse to A unless A pays cash? Why?
22. X ships some lumber to A. While it is on the way he learns

that A is insolvent. He at once notifies the railroad. Nevertheless the railroad delivers the lumber to A. X sues the railroad. Should he recover?

23. X says to A, "I will give you my horses in pledge if you will loan me $100." A agrees and makes the loan. Then X, still having the horses in his possession, sells them to B. A claims that the horses in the hands of B are security for his loan to X. Is A's claim valid?
24. X has a large quantity of wheat in a warehouse. He wishes to borrow from A and to give the wheat as security. He hands A his warehouse receipt and A gives X the money. Has a valid pledge been made?
25. A pledges his horse and buggy to X and the latter takes possession of them, but he frequently allows A to use them for the day. A, on one of these occasions, takes the buggy to the shop of B to be repaired. Has B a lien good against X, who demands the buggy without tendering the amount of the charges for repairs?
26. A takes a horse which he borrows from B to a hotel belonging to X. X knows the horse is the property of B. Has X a right to hold the horse for A's hotel bill?
27. A ships some logs which he believes to be his own over the X railroad. The agents of X also think they are receiving A's logs. It turns out that B is the true owner. Under such circumstances has X a lien on the logs for the charges of transportation?
28. What are the chief characteristics of those statutory liens on personalty which are not dependent on possession?
29. Give some examples of the liens on personal property not based on possession which are commonly accorded by statute.
30. What are some of the characteristics of maritime liens and how do they differ from common law and equitable liens?
31. To what property can maritime liens attach and in general for what obligations are they granted?
32. A ship whose home port is Milwaukee and whose owner resides there is taken by its captain to the dock of the X company in Milwaukee to be repaired. The repairs are made. The ship sails to Chicago and the next time it returns to Milwaukee the X company libels it, claiming a maritime lien. Is the claim valid?

33. A large amount of salary is due the master of a ship. The owner is insolvent and without property other than the ship. The master claims a lien. Is he entitled to one?
34. X finds a vessel belonging to A adrift on the sea. He brings it in to the nearest seaport and claims a reward for doing so. What are the rights of X?
35. The X and Y boats collide and as a result the X boat sinks. The masters of both were negligent. What right, if any, has the owner of the X boat against the owner of the Y boat?
36. What are the general characteristics of equitable liens?
37. X advances money to A to purchase goods upon A promising that the goods shall stand as security for the debt. A makes the purchase and then sells the property to B, who knows of A's agreement. Has X a lien upon the goods?
38. B owes X $100. X assigns his right against B to A, and A notifies B. X then becomes insolvent. What are A's rights as to the debt owed X by B?
39. X conveys a piece of land to A, and A pays him $100 down and agrees to pay the balance in twelve monthly installments of $50 each. After one month the land is seized by creditors of A. The deed to A is recorded and shows that the full purchase price is unpaid. What are X's rights?
40. A contracts for the purchase of a house and lot from X and pays him a part of the purchase price, X agreeing to convey title when the price is paid in full. X then sells and conveys the land to B, who knows of X's contract with A. What are A's rights?
41. A trustee incurs certain necessary expenses in connection with the property held in trust. He refuses to surrender the property when the time comes for turning it over to the beneficiary until his expenses are paid. Is he entitled to do so?
42. Explain under what circumstances, in the absence of statutory provision, a person who occupies land thinking he is the owner and who makes improvements on it can get some compensation for the improvements.
43. A, by will, leaves a parcel of land to X and directs X to pay B $100 out of it. What is the nature of B's right? Why?
44. How is a mechanic's lien acquired and what is necessary to perfect it in order for it to be good against third parties?

45. What is the nature of a miner's lien and to what property does it attach?
46. Describe the effect of a lien on land for the non-payment of taxes upon it.
47. Does the law of bailments apply to holders of possessory liens? Explain.
48. X, the holder of a possessory lien, is deprived of the possession of the property by A, the owner. What are X's rights?
49. A horse belonging to A is pledged to X. X uses him. What are A's rights in the matter?
50. X sells a cow to A, but retains possession for some weeks, waiting for A to pay the price. During that time it costs X a considerable amount for the feed of the cow. X refuses to give her up until A pays for the feed in addition to paying the price of the cow. Is X within his rights in so doing?
51. X, a jeweler, who has repaired a watch belonging to A, retains possession waiting for A to pay. X leaves the door of his shop unlocked while he goes to lunch and some one enters and steals the watch. Is X liable for the watch in an action brought against him by A?
52. After payment of the debt secured by a pledge, the pledgee refuses to let the owner have his property. What are the owner's rights under those circumstances?
53. X, a tailor, holds a coat belonging to A as security for work he has performed in repairing it. X gives the coat to B upon B's paying half the charges due him for the repairs, and tells B that he can hold it for the original charges. A demands the coat of B. Has B a right to withhold it?
54. X, to whom a diamond ring belonging to A has been given in pledge, hands the ring to B and transfers his claim against A to B. Has B a right to retain the ring?
55. A, by special agreement, allows X to retain possession of a horse as security for a debt. A then goes to X and, on the pretense that he wishes to take a ride, gets possession of the horse and refuses to return it. Is X's lien lost?
56. X, who has a pledge belonging to A, says to A, who asks a return of the property without offering to pay the debt, "The property is mine, I shall not let you have it." Is the pledge lien destroyed by X's statement?
57. X, the owner of some property which he has pledged to A,

becomes bankrupt. Is A's right to hold the property lost?

58. X has a lien on some lumber in his possession, belonging to A, for labor performed in dressing it. A refuses to pay, and X sells the lumber in order to get his charges. Has X a right to do so?

59. X has a gun pledged to him by A. Upon A's failure to pay the debt when due X sells the gun to B, without notifying A. Was X within his rights?

60. X, a livery stable keeper, is given a lien by statute. He has a horse belonging to A which he is entitled to hold by virtue of such a lien. X brings a bill in a court of equity asking that the horse be sold to satisfy his lien. Should his request be granted?

61. X in his will charged a parcel of land which he gave to his son Y, with the payment of a legacy to A. Y, after X's death, sells the land to B, who knows of the provisions of X's will. Has A a lien enforcible against the land in the hands of B?

62. What is meant by an action in rem?

QUIZ QUESTIONS
LAW OF AGENCY

(The numbers refer to the numbered sections in the text.)

1. What may be said in regard to agency as a separate branch of law?
2. Define agent.
3. Define principal.
4. Wherein does agency differ from service?
5. Give the various classifications of agents. Define general agent; special agent.
6. Name some agencies which are usually given separate consideration.
7. Give the general rule in regard to the purposes for which agents may be appointed.
8. Discuss the rule that an illegal or immoral act cannot be delegated. What classes of acts are forbidden to be delegated as against public policy? Are lobbying agents able to enforce their contracts with the principal?
9. How, in general, is the relationship of principal and agent established? Is it necessary that the contract of agency be in writing?
10. State briefly the necessary elements of the contract of agency.
11. What consideration should exist between the parties for the contract of agency? State briefly what is meant by consideration in the contract.
12. Give the general rule as to who may be principals.
13. What is the rule in respect to infants as principals?

14-18. What is the rule as to principals in respect to insane persons? Married women? Corporations? Partnerships? Clubs?

19. What is the rule as to who may become agents?

20. What are the legal principles governing the appointment of infants as agents? Married women? Corporations? Partnerships?
21. What is meant by joint principals? Give examples. What are the principles governing the liability of members of unincorporated societies and clubs?
22. What are the rules governing the execution of the authority by joint agents? What exception to the rules?
23. Can an agent act for two opposing principals? If so, state under what circumstances.
24. What is meant by agency by estoppel? Give an illustration.
25-26. What is the meaning of agency from necessity? Give the more common instances in which agency from necessity operates.
27. What is meant by the formation of the relation of principal and agent by ratification?
28. State in a concise manner the meaning of ratification.
29-31. State the necessary elements of ratification and give illustrations of the application of the doctrine of ratification.
32. What form should the ratification by the principal take? When is it necessary that ratification should be in writing? When is it necessary that ratification should be by instrument under seal?
33. State generally what acts may be ratified.
34. Has the validity of the act anything to do with the manner or form of ratification thereof? Can forgery be the subject of ratification?
35. What is the general doctrine as to who may ratify the act of an alleged agent? Can a partner ratify the act of his co-partner? Can an agent ratify the act of a sub-agent?
36. What is the effect of the ratification by the principal of the contract made by the agent?
37. Does the ratification of a contract made by the agent bring the principal into privity with the third party? What is the doctrine as to whether the third party may withdraw before the principal ratifies?
38. Can the principal by ratifying the act of an alleged agent interfere with the previously acquired rights of strangers?

39. After the ratification is the agent wholly released from responsibility to the principal?
40. What is the effect of ratification as between the agent and the third party?
41. May an agent delegate his authority? What is meant by delegation of authority? If possible give the Latin maxim.
42. Are there any circumstances under which an agent may delegate authority involving judgment and discretion?
43. What may be said as to the delegation of mechanical and ministerial duties?
44. Give the definition of a sub-agent. Has an agent authority to employ a sub-agent? If so, state under what circumstances.
45. What are in general the methods of terminating the relation between the agent and the principal?
46-47. What is meant by the termination of the relation of principal and agent by original agreement? What is meant by termination by subsequent agreement?
48. How may a principal revoke the authority of his agent, and what agencies are revocable at will?
49. Distinguish between the principal's right to revoke and his power to revoke, and give examples.
50. Is the element of good faith on the part of the principal in revoking an agency ever a factor in determining the rights of the agent?
51. State what is meant by "power coupled with an interest" and give an illustration.
52. After the revocation of an agency by a principal, what notice, if any, is required to be given by him? Does the principal's liability for the acts of the agent continue where he fails to give notice?
53. What is the result of a renunciation of his appointment by the agent?
54. State the manner in which an agency may be terminated by operation of law.
55. What effect has the death of the principal or of the agent upon the agency?
56-58. What effect has the insanity of either principal or agent upon the agency? What effect has the bankruptcy of

either? What effect has the outbreak of war on the relationship?

59. Has the marriage of either party any effect upon the relationship of principal and agent?

60. What is meant by express authority given to an agent and what may be said as to the extent to which an agent may go in exercising it?

61. How may implied authority in an agent arise? Give an example.

62. (a) What is meant by general authority and what by special authority of an agent? (b) May general authority and special authority arise by implication?

63. (a) Is there any distinction between the authority given to an agent and instructions given to him? (b) A is a diamond merchant, and B is a jeweler. B is accustomed to receive goods from A for sale to his customers. A places in B's hands a diamond ring, and it is agreed that B may offer it for sale and that he is to pay for it when it is sold. B sells the ring to C, but B absconds with the money. A sues C to recover the purchase price. Can he recover?

64. (a) To what extent are third parties protected in dealing with a general agent? (b) To what extent are they protected in dealing with a special agent?

65. (a) What is the general rule of the construction of a written power of attorney? (b) Write out a power of attorney to John Jones, authorizing him to manage your coal business while you are in Europe, and put in such provisions as you would consider necessary for the proper management of the business during your absence.

66. What construction is placed upon the authority when the same is given to an agent by word of mouth?

67. When the authority given to an agent is doubtful or ambiguous, to what extent will the third party be protected in dealing with the agent?

68. When the authority of an agent arises by implication, what is the rule of construction of such implied authority?

69-70. (a) How is an agent given authority to sell land? (b) A authorizes B to sell his house and lot, but does this by word of mouth. How far may B go in the transaction?

(c) If B conveyed title to C under the oral authority, would C have legal title against the owner?

71. A, in driving through the town of Chatham, stops at the Phenix Hotel over night and leaves his horse and wagon in the stable of B. The next morning before A calls at the stable B represents to C that he owns the horse and wagon and sells it to C. B receives the purchase price. A, learning that C has possession of the horse, attempts to take it away from him, but C resists. What are the rights of the parties?

72. Where an agent is given authority to purchase property, can he sell his own property to the principal?

73. What is the general rule as to whether an agent may make or endorse negotiable paper on behalf of his principal?

74. To what extent may an agent act who is given authority to manage the business of his principal?

75. (a) How must an agent execute the authority conferred on him? (b) Can agency be proved by the statements and declarations of the agent? (c) Where both the principal and the agent deny the agency, how may the third party prove the same?

76. (a) How should an agent who is to perform an act under seal execute his authority? (b) Assume that the agent has signed an instrument under seal with his own name, and that the third party knew he was signing simply as an agent for a particular principal. Can the principal sue the third party on the sealed instrument?

77. (a) A signs a contract not under seal in his own name. Later the third party learns that A acted merely as agent, whereas he had relied upon the personal responsibility of A at the time the contract was made. The third party sues the principal. Can he recover? (b) In the event that the third party sues the agent, can the agent relieve himself from responsibility by showing that he acted for a principal?

78. May an agent's authority to make and endorse negotiable instruments arise by implication? If so, give an illustration.

79-80. (a) What are the chief duties of the principal toward the agent? (b) Where no amount of compensation has

been agreed upon for the agent, how is it usually to be determined?

81. Is the principal obliged to reimburse and indemnify the agent? If so, to what extent and under what conditions?

82. (a) Can an agent who acts for two different principals in a transaction recover from both or either? (b) State under what circumstances, if at all, he might recover from both principals.

83-84. What are the principal duties of the agent toward his principal?

85. (a) May an agent deal with himself to his own personal gain in transacting business of his principal? (b) A was employed as agent to sell wearing apparel on the road and to give his exclusive time to his principal's business. He engaged, however, in a similar line of business in his own behalf and made considerable profit. The principal, learning of the facts, brought action against the agent to recover all the profits the agent had made, and succeeded. Was the judgment correct?

86. What may be said as to the rule which requires an agent to obey the instructions of his principal?

87. Assuming that the principal's instructions are ambiguous, how should the agent act?

88. Can custom or usage vary the instructions given to an agent?

89. Assuming that an agent is careless in the performance of his duties, does he forfeit his right to compensation?

90. What is the general rule as to the obligation of an agent to account for money and property of his principal?

91. To what extent is an agent obliged to give notice to his principal of transactions in which the principal is interested?

92. What is meant by a disclosed principal?

93-94. When the principal is disclosed at the time of the transaction, is the agent responsible to the third party?

95-96. Is the principal ever responsible to a third party where the agent acts beyond his actual authority?

97-98. (a) What is meant by an undisclosed principal? (b) What is the general rule as to the responsibility of an undisclosed principal to a third party?

99. Under what circumstances may an undisclosed principal bring suit against the third party?

100-101. (a) In the event that an alleged undisclosed principal is sued on a contract made by a supposed agent, is it competent for the principal to show that he was not the real principal? (b) State in substance the parol evidence rule, first in connection with the principal's liability, and secondly, in connection with the agent's liability.

102-103. Under what circumstances is notice to the agent notice to the principal?

104. Is the principal liable to third parties for the agent's torts? State the rule.

105-106. State in a general way the duties and liabilities of an agent to third persons, and give a concrete illustration as to the manner in which an agent may personally bind himself to third persons in contract.

107-108. To what extent and under what circumstances is an agent responsible to third parties for his torts?

109. May an agent in his own name sue a third party in contract? Give a concrete illustration.

110-111. State in a few words the relationship existing between attorney and client.

112. (a) What is the scope of the attorney's authority? Name some of the things which an attorney may do in managing a cause for his client. (b) Name some of the acts which an attorney may not perform for his client without express authority.

113. Name some of the obligations and responsibilities of attorney to client.

114. (a) When the relationship is established, what are the obligations of the client to the attorney? (b) How is the attorney's compensation fixed?

115. Has an attorney any claim or lien on his client's papers or property?

116. What is the rule as to whether or not an attorney may divulge communications made to him by his client in the course of his employment?

117. Define in a few words what is meant by an auctioneer and state his general duties.

118. May an auctioneer be held personally liable by the third party with whom he deals on behalf of a principal?

119. What are the rights of the auctioneer as to compensation? State whether or not he has a lien on the goods of the principal.

120. (a) What is meant by a broker? (b) What do you understand by a broker working on a contingency or on a commission? (c) State the rule as to whether a broker's authority may be revoked without notice. Name the different classes of brokers.

121-123. (a) How is a broker appointed, and what, in general, are his duties and liabilities? (b) What are his rights as to compensation, reimbursement, indemnity, etc? (c) Has a broker a lien on his principal's goods?

124. What is meant by a factor?

125. State in a few words the factor's duties and liabilities.

126. (a) What are a factor's rights? (b) Has he a lien on the goods of his principal?

QUIZ QUESTIONS

LAW OF SALES OF PERSONAL PROPERTY

(The numbers refer to the numbered sections in the text.)

1. What is meant by the Uniform Sales Act?
2. What is meant by a "sale" of personal property?
3. What is the difference between "sale" and "barter"?
4. A met B on the street and offered to sell his horse to B for $100. B paid him the $100 and immediately went to take possession of the animal. He found that the horse had been killed about an hour previously. Who must suffer the loss?

5-6. A owned a mare and sold to B all the colts which she might raise for five years. Soon after this bargain A sold the mare to C without notice of this agreement. The mare has had three colts while in C's possession during the five years. What are the rights as between B and C?

7. A, a skillful carpenter, had certain lumber, nails, etc., and the tools for cabinet work. B paid him $100 for a desk to be made from this particular lumber. As soon as the desk was finished A sold the same to C. B claims the property from C. What decision?
8. Can a person transfer any rights to property which he does not now own?
9. A owned five horses, and B paid him $200 to allow him to take his pick. B had reasonable opportunity to make a selection but had not as yet done so, when the horses were all destroyed by fire. What are the rights of the parties under the circumstances?
10. A telephoned to the grocer to send him a sack of XXXX flour. The grocer took a sack of the kind of flour specified,

marked it with A's name and set it aside for delivery. It was then stolen. Must A pay for the flour?

11. Suppose in the above case that A had come to the store and picked out this particular sack. Would this change the result?

12. A in Chicago ordered goods from B in New York, saying nothing about payment of the freight. B selected goods of the kind ordered and delivered them to the railroad company, addressed to A, saying that A would pay the freight. The goods were destroyed in a wreck. Upon whom is the loss?

13. Would it make any difference in the above case if B was to pay the freight?

14-15. A has one hundred bushels of wheat in a bin. Will it make any difference whether he sells B "ten bushels" or "one-tenth" of this grain, if the whole is destroyed before the buyer has taken his share?

16-17. A is conducting an elevator for the storage of grain. There is ten thousand bushels in the elevator, one-half of which belongs to A. B paid A $1000 for one thousand bushels, but before he took the grain, five thousand bushels of the grain stored was destroyed. What are B's rights?

18. What is meant by "fungible goods"?

20-21. A purchased from B all the hay in B's mow at ten dollars per ton, the exact quantity being unknown, the hay to be weighed on B's scales as taken away. Before any was removed the barn and its contents were destroyed. What are the rights as between A and B?

23-25. (a) A offered to purchase a certain horse of B if upon trying him for a week he proved satisfactory. A took the horse, and he was killed while in A's possession, but without his fault, before the week had expired. Upon whom is the loss?

(b) Would it make any difference in the above case if the bargain had been to purchase the horse with the privilege of returning him whenever he might prove unsatisfactory?

26. A came to B's jewelry store and asked to purchase a certain watch. The jeweler handed the watch to A, who put it in his pocket, but refused to pay the cash and went away with the watch. He later sold it to C, who paid value and

had no knowledge of A's conduct. B claimed the watch from C. Who should prevail?

27. What is meant by the phrase "conditional sale," and how does it differ from the case of a sale made on a certain condition?

28-29. What is the difference between conditional sale and chattel mortgage?

30-31. A purchased a piano from B on the following terms: He was to pay ten dollars per month until four hundred dollars was paid, and upon making the last payment was to receive the title. It was further provided that if any three payments were not made when due B might take back the piano and any payments made would be considered rent for A's use of the article. After paying three hundred dollars A failed to make the next three payments. B took the piano and refused to return the money which had been paid. What are the rights of the parties?

32. Suppose that in the above case, before any default on A's part, the property had been destroyed without his fault. Upon whom is the loss?

33. What is the reason and necessity of the statutory provisions requiring the recording of such transactions?

34. What is meant by a "bill of lading"?

35. Goods were shipped to A under a bill of lading which merely required that they be delivered to A. While the goods were still in the carrier's possession A sold the goods to B, and then later sold and transferred the bill of lading to C. B and C each claim the goods. Who has the better right and why?

36-38. Would it make any difference in the above case if the bill of lading had been made out to "A or order"?

39. Suppose that a bill of lading made to "A or bearer," is lost by A, and having been found by B is by him transferred to C, who paid value and supposed that B was properly possessed of the same. What are the rights as between A and C, in the absence of statute?

40. What would be the situation in the above case under the provisions of the Sales Act?

41. What difference, if any, in the above case if the bill of lading had been made to "A or order"?

42. In compliance with B's order A shipped goods to him, but in order to secure payment he took the bill of lading in his own name "or order." The goods were destroyed while in the hands of the carrier. Who should bear the loss, A or B?
43. A stole goods from B, shipped them, receiving a bill of lading to "A or order." He then sold the bill of lading to C, who purchased the same for value and without notice. Is B or C entitled to the goods?
44. A represented to the freight agent of a railroad company that he had left certain goods on the platform and asked to have a bill of lading for the same. The agent, relying upon his statement, issued a bill to "A or order," which A then sold to B, an innocent purchaser. In fact A had never delivered any goods to the carrier. What rights, if any, does B have by reason of this transaction?
45. A held an "order bill of lading" calling for certain goods. He induced the carrier to let him have the goods without surrendering the bill of lading. He then sold the goods to B, and later sold the bill of lading to C. Who is entitled to the goods?
47. What is meant by a vendor's lien?
48. A sold a horse to B for two hundred dollars, one hundred dollars of which was then paid and the other one hundred dollars was to be paid the next day when B came for the horse. When B offered the other one hundred dollars and demanded the horse, A refused to give him up until B also paid fifty dollars which he owed to A upon a previous transaction. This B refused to do and left without paying the one hundred dollars still due on the purchase price of the horse. B now seeks to get possession of the horse by legal process. What are his rights?
49. A sold a horse to B, but was to retain possession until payment was made. B asked A to let him take the horse to use for an hour, promising to return him to A's possession at the end of that time. A gave his permission, but as soon as B secured the horse he sold it to C, who was an innocent purchaser for value and without notice. A claims the possession of the horse from C. What decision?
50. If goods are in the buyer's possession at the time of the

sale, does the seller have a lien thereon for the purchase price?

51. A sold to B one thousand bushels of corn. After having delivered five hundred bushels to B, A refused to deliver any more unless B paid the price for the one thousand bushels. What are the rights of the parties?
52. A sold a horse to B for two hundred dollars, giving B thirty days within which to pay for the same. B called for the horse the next day, but A refused to give up possession until the price was paid. Who is entitled to the possession of the horse?
53. A purchased one thousand bushels of grain from B, but did not pay for the same. He then resold it to C, who made known to B the purchase of the goods. After delivering one hundred bushels of the grain to C, B refused to allow him to have any more until he was paid the purchase price of the goods. C seeks to recover possession from B. What decision?
54. A sold goods to B on ninety days' time. He delivered part of the goods to B, and then, discovering that B had become insolvent, refused to deliver the rest. Who is entitled to possession?
55. What is the effect upon the vendor's lien when the purchaser makes tender of the full amount due?
56. The purchaser of goods which are being held under a vendor's lien, by fraud induces the vendor to give up possession and then sells the same to a third person, who pays value but has knowledge of the fraud. What rights does such buyer secure?
57. How may the seller secure payment under his vendor's lien?
58. Define stoppage in transitu.
59. When may the right of stoppage in transitu be exercised?
60. What is necessary to prove in order to show sufficient insolvency to justify stoppage in transitu?
61. A shipped goods to B, sending him a negotiable bill of lading therefor. While the goods were in transit he learned of B's insolvency and decided to stop the goods. After A gave notice to stop, B sold the bill of lading to C, a purchaser for value. Is the stoppage effective?

62. A shipped goods to B, sending him a negotiable bill of lading covering the same. B gave this bill to a bank as security for a loan of an amount much less than the value of the goods. B became insolvent and A seeks to hold the proceeds of the bill remaining after the payment of the bank's claim. What decision?

64. Goods were shipped from point A to point C. At an intermediate station, B, the goods had to be reshipped and carried by wagon route from B to C. While stored at B awaiting such reshipment, the shipper gave notice to have the goods stopped. The buyer claims that the transit has ended. What decision?

65. A sold goods to B which B resold and shipped to C. Learning of B's insolvency A seeks to stop the goods while in the hands of the carrier. What decision?

66-68. (a) B in Chicago ordered goods from A in London, the goods to be shipped to B's agent, who would redirect them. When the goods arrived in New York B's agent redirected them to B at Chicago. A seeks to exercise his right of stoppage in transitu while the goods are in transit from New York to Chicago. What are the rights of the parties?

(b) Goods were shipped by express and the shipper, learning of the buyer's insolvency, seeks to stop the goods after they have left the possession of the railroad company and are being carried in the express company's wagon, for delivery to the buyer's residence. What decision?

69. Goods were shipped from point A to point C, but the buyer induced the railroad company to make delivery to him at an intermediate point, B. The shipper seeks to stop the goods before they could have reached point C. Has he any rights against the carrier for so delivering? Has he any rights to the goods as against the creditors of the purchaser?

70-71. What are the seller's rights in order to secure payment after he has properly exercised the right of stoppage in transitu?

72-74. After properly exercising his right of stoppage in transitu, the seller waited a reasonable time for the buyer to redeem the goods. The buyer failing to do so, the seller

then sold the goods without giving notice to the buyer of the time or place of such sale. Has the buyer any right against the seller for so doing?

75. A purchased goods from B, which B properly stopped in transit. Upon resale of the same properly made by B, he secured more than the amount due to him as the purchase price of the goods. To whom does this profit belong?

76. To what extent may the seller be considered as the agent of the buyer in making a resale of the goods after stoppage in transitu?

77. The seller had properly exercised his right of stoppage in transitu and had waited a reasonable time for the buyer to redeem the goods, but the buyer had taken no steps to do so. Later, however, finding that the seller was still in possession of the goods, the buyer tendered the price, but the seller refused to give up the goods, saying that he had decided to keep them as his own. Who is entitled to the goods?

78. What is meant when it is said that goods are shipped "C. O. D."?

79-80. The sale of liquor is by law prohibited in state X. A living in state X ordered a jug of whiskey from B living in state Y. B shipped the same to A by express "C. O. D." The express company in state X delivered the goods to A upon his paying the C. O. D. charges, which included the purchase price and the cost of transportation. The express company is accused of selling liquor within the state. Is it guilty?

81-82. By representing that he was in good financial condition when in fact he was insolvent, B induced A to sell him a certain horse on credit. B then resold the horse to C, an innocent purchaser for value and without notice of the fraud. A claims the horse from C. What decision?

83. B represented that he was the agent of C and wished to buy certain goods for him. A thereupon sold, supposing he was selling to C through B as C's agent. As soon as B received the goods he resold them to D, who purchased for value and without notice of the fraud. Upon discovering the fraud A seeks to recover the goods from D. What are the rights of the parties?

84. By fraud B induced A to sell certain goods to him, but later repented and wished to make A take the goods back. Can he compel him to do so?

85. What must be shown in order to make a contract voidable for fraud?

86. Why is the innocent purchaser of goods protected as against the original owner who was induced by fraud to sell them?

87-88. How may the retention of possession by the seller, after the title has passed, operate as fraud upon creditors of the seller? Of the buyer?

89. A loaned his horse to B. C, seeing the horse in B's possession, inquired if he owned it. Upon B representing that he did, C purchased the horse from B, who gave him the possession of the same. What are the rights of A and C?

90. A sold a horse to B but retained possession at the request of B, who feared that his creditors might seize it. The creditors of A now seize the horse in payment of A's debts, but B claims the horse from them. Who is entitled to it?

91. After the sale and delivery of goods to the buyer, does the seller have any special claim on these goods, which is different from the rights of other creditors?

92. What are the remedies of the unpaid seller who is still in possession of the goods?

93. How are the damages estimated upon the failure to perform a contract for the sale of goods?

94. A wrote to B enclosing a draft for one thousand dollars with the statement that if B would agree to send him one of the autos manufactured by B when directed to do so he might keep the money. B agreed to this and cashed the draft. Later A wrote saying he had changed his mind and demanded back his money. B offered to send A a car of the kind agreed upon but refused to return the money. What are the rights of the parties?

95-98. B wrote to A requesting him to make a carriage according to a certain design. When the carriage was finished B refused to take the same. What are A's rights?

99. How is the buyer's damage estimated when the seller refuses to perform his contract to sell?

100-101. What difference, if any, in the above case, when the purchase price of the goods has already been paid?

102. A had a horse which he had purchased from a stranger, and which he believed might turn out to be stolen property. He sold the same to B for one hundred dollars, acquainting him with all the facts. The horse had in fact been stolen from C, who reclaimed it from B. Can B recover his money back from A?

103. B purchased goods from A on credit, but when he called for the goods A refused to let him have them unless he paid the price in cash. B is perfectly solvent. What are his rights?

104-105. If A has promised to sell B certain property and then refused to do so, can B compel A to sell?

106. What is meant by a buyer's right of inspection?

107. B ordered certain goods of A to be delivered at B's residence and to be paid for in cash. The goods were boxed and B asked to open the boxes and examine the goods before paying the price. This A refused to allow and took away the goods. He now brings action against B for breach of his contract. What decision?

108-109. B ordered goods to be shipped to him by A, and when they arrived asked to inspect them before accepting. This A refused, saying that the title had already passed and that B might have inspected them before they were shipped had he so desired, and that, not having done so, his right was gone. Is the seller's contention correct?

110. Under what circumstances may the seller use part of the goods in order to make inspection, and how much of the goods may be so used?

111. What acts on the buyer's part will show his acceptance of the goods?

113. What is meant by the expression "caveat emptor"?

114. A sold a horse to B, from whom it was taken by C, who proved that it had been stolen from him and sold and through various transfers had come into the hands of A. Has B any right against A?

115-116. Does it make any difference in the implied warranty of title whether the goods sold are in the seller's possession or not?

117. A sold to B a watch which had been left with him as a pledge but had not yet been redeemed by the owner. B

bought with knowledge of these facts. The owner of the property claims it from B. Discuss whether B has any right against A.

118-119. A left his watch with a watchmaker for repair. While so in the watchmaker's possession A sold the watch to B. When B called for the watch the watchmaker refused to give it up until paid the charges for repairing. B paid the charges and now seeks to recover this amount from A. What decision?

120. To what extent is the rule of caveat emptor limited by the implied warranty of merchantability?

121. A was a dealer in seeds. B ordered certain seeds to be shipped to him by A. The seeds were of the kind ordered but a large percentage were not fertile. Has B any right of action against A?

122. Would it make any difference in the above case if B had called at A's store and examined the seeds before purchasing?

123. What is the difference between implied warranty of merchantability and the warranty of fitness for a particular purpose?

124. B wrote to A, dealer in firearms, as follows: "The wolves have been bothering my sheep and I want a rifle to get them with. Please send me a 22 calibre Smith, Model A." A sent a rifle of the model called for but it was entirely unfit for this purpose. Is he liable to B on a breach of warranty?

125. A, a dealer in provisions, sold to B what he supposed were mushrooms. In fact they were toadstools, and by eating them B was made very sick. Has he any right of action against A?

126. A sold a horse to B, expressly warranting that he was sound. The horse was in fact sound but A's title to him was not clear. Can B recover on the implied warranty of title?

127-128. What is necessary to constitute a warranty?

129. B was bargaining with A for the purchase of a horse and asked him if the horse was gentle. A replied, "Any child can drive him." In fact the horse was of a vicious disposition. B brings action against A for breach of war-

ranty, but A claims that his statements would not constitute a warranty. What decision?

130. A sold a horse to B, at the time giving no warranty of soundness. The day after the sale B complained to A that the horse was not sound. A replied, "The horse is sound as a dollar and I warrant him to be so." The horse was in fact unsound. Can B hold A for breach of warranty?

131-132. Before selling a colt to B, A made this statement, "When that colt is four years old he will be able to do a mile in 2:20 or better." At four years old the colt was not capable of doing a mile in better than three minutes. Is the seller liable for breach of warranty?

133. A sold a horse to B which had but one eye, but gave a warranty that the horse was sound. The buyer inspected the horse and noted the defect. He later brought action against the seller for breach of the warranty of soundness because of the fact that the horse had but one eye. What decision?

134. B wrote to A saying that he wanted to buy a thoroughbred shorthorn bull to use for breeding purposes. A wrote back that he could sell him a calf of this description which when full grown would make a good animal to head his herd, but that it was now only three months old. B purchased the calf, but it turned out to be unfit for breeding purposes. Has he any right of action against the seller for breach of warranty?

135. A sent samples of cloth to B, who ordered a bolt like one of the samples. When the cloth arrived B found that it was of a poorer quality than the sample. B brought action against A for breach of warranty, but A claimed he had made no representation as to the quality of the goods. What decision?

136. What remedies are given to the buyer for breach of warranty?

137-138. B ordered from A a certain quantity of No. 1 wheat. When the wheat arrived B discovered that it would not grade as No. 1 but was of a poorer quality. He nevertheless accepted the wheat. When the seller brought action for the purchase price B asked to have set off against the

purchase price the damages for the breach of warranty. What decision?

139. What is meant by the remedy of rescission for breach of warranty?

140-141. When should the description of the goods be properly treated as a condition of the sale rather than a warranty?

142. What was the purpose of the Statute of Frauds?

143. To what class of transactions does the seventeenth section refer?

144-147. A, a miller, had certain wheat which he promised to grind up and make into flour for B. He failed to do so and B brought action against him. A set up the Statute of Frauds. But B claims that the contract was a contract for work and labor and not a contract for sale. What should be the decision?

148. Does a promissory note come within the meaning of "goods, wares, and merchandise"?

149. A sold to B a crop of potatoes then growing upon A's land, for a price less than that mentioned in the Statute of Frauds. B claimed that he was not bound by the contract because it referred to an interest in lands and should have been in writing. What decision?

150. A sold to B all the timber growing on a certain tract of land, B to have two months within which to cut and remove the same. B refused to carry out his part of the agreement, and when action was brought against him by A he set up the Statute of Frauds. What decision?

151. A agreed to sell to B a dozen chickens at one dollar each. The Statute of Frauds in their state required all contracts for the price of ten dollars or over to be in writing. Can B set up the Statute as a defense?

152. If the Statute is not complied with, what effect does it have on the contract?

153. Under an oral contract A delivered goods to B, but B without reason refused to accept the same. A brings action for the price and B sets up the Statute of Frauds. What decision?

154. A offered to sell certain goods to B and B agreed to take them if A would not require him to pay cash but would allow him to set off against the purchase price a debt which

A owed to B. Does this constitute such a part payment as to take the case out of the Statute?

155. A orally contracted to sell certain goods to B. Soon after the bargain B made a private memorandum of the agreement setting forth all its terms. Can A hold B?

156. A wrote to B offering to sell him certain goods for a definite price. B telephoned his acceptance of the offer, and no writing with reference to the bargain was afterwards made by either party. Will A's letter be a sufficient memorandum to satisfy the Statute, in an action by B against A?

157. What is the difference between "signing" and "subscribing"?

158. Under the facts as stated in question 155 above, can B hold A?

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PART I

ACQUISITION OF PERSONAL PROPERTY

CHAPTER II.

TITLE BY OCCUPANCY.

Occupancy—Pursuit and Capture of Wild Animals.

GEER v. STATE OF CONNECTICUT.

161 U. S. 519, 40 L. Ed. 793. 1896.

In Error to the Supreme Court of Errors of the State of Connecticut.

Information by the state of Connecticut against Edward M. Geer for violation of the game law. A conviction was affirmed by the supreme court of errors of the state, and defendant brings error. Affirmed.

An information was filed against the plaintiff in error in the police court of New London, Conn., charging him with, on the 19th day of October, 1889, unlawfully receiving and having in his possession, with the wrongful and unlawful intent to procure the transportation beyond the limits of the state, certain woodcock, ruffed grouse, and quail, killed within this state after the 1st day of October, 1889. The trial of the charge resulted in the conviction of the defendant, and the imposing of a fine upon him. Thereupon the case was taken by appeal to the

criminal court of common pleas. In that court the defendant demurred to the information, on the ground, among others, that the statute upon which that prosecution was based violated the constitution of the United States.

The demurrer being overruled, and the defendant declining to answer over, he was adjudged guilty, and condemned to pay a fine and costs, and to stand committed until he had complied with the judgment. An appeal was prosecuted to the supreme court of errors of the state.

In the supreme court the conviction was affirmed. The case is reported in 61 Conn. 144, 22 Atl. 1012, and to this judgment of affirmance, this writ of error is prosecuted.

WHITE, J., after stating the case, delivered the opinion of the court.

In other words, the sole issue which the case presents is, was it lawful, under the constitution of the United States (§ 8, art. 1), for the state of Connecticut to allow the killing of birds within the state during a designated open season, to allow such birds, when so killed, to be used, to be sold, and to be bought for use, within the state, and yet to forbid their transportation beyond the state? Or, to state it otherwise, had the state of Connecticut the power to regulate the killing of game within her borders so as to confine its use to the limits of the state, and forbid its transmission outside of the state?

In considering this inquiry, we, of course, accept the interpretation affixed to the state statute by the court of last resort of the state. The solution of the question involves a consideration of the nature of the property in game and the authority which the state had a right lawfully to exercise in relation thereto.

From the earliest traditions, the right to reduce animals feræ naturæ to possession has been subject to the control of the law-giving power.

Among other subdivisions, things were classified by the Roman law into public and common. The latter embraced animals feræ naturæ, which, having no owner, were considered as belonging in common to all the citizens of the state. After pointing out the foregoing subdivision, the Digest says:

"There are things which we acquire the dominion of, as by

the law of nature, which the light of natural reason causes every man to see, and others we acquire by the civil law; that is to say, by methods which belong to the government. As the law of nature is more ancient, because it took birth with the human race, it is proper to speak first of the latter. (1) Thus, all the animals which can be taken upon the earth, in the sea, or in the air,—that is to say, wild animals,—belong to those who take them, * * * because that which belongs to nobody is acquired by the natural law by the person who first possesses it. We do not distinguish the acquisition of these wild beasts and birds by whether one has captured them on his own property or on the property of another; but he who wishes to enter into the property of another to hunt can be readily prevented if the owner knows his purpose to do so." Dig. Bk. 41, tit. 1, De Adquir. Rer. Dom.

No restriction, it would hence seem, was placed by the Roman law upon the power of the individual to reduce game, of which he was the owner in common with other citizens, to possession, although the Institutes of Justinian recognized the right of an owner of land to forbid another from killing game on his property, as, indeed, this right was impliedly admitted by the Digest in the passage just cited. Inst. Bk. 2, tit. 1, § 12.

This inhibition was, however, rather a recognition of the right of ownership in land than an exercise by the state of its undoubted authority to control the taking and use of that which belonged to no one in particular, but was common to all. In the feudal as well as the ancient law of the continent of Europe, in all countries, the right to acquire animals feræ naturæ by possession was recognized as being subject to the governmental authority. * * *

In tracing the origin of the classification of animals feræ naturæ, as things common, Pothier moreover says:

"The first of mankind had in common all those things which God had given to the human race. This community was not a positive community of interest, like that which exists between several persons who have the ownership of a thing in which each has his particular portion. It was a community, which those who have written on this subject have called 'a negative community,' which resulted from the fact that those things which were common to all belonged no more to one than to the others,

and hence no one could prevent another from taking of these common things that portion which he judged necessary in order to subserve his wants. Whilst he was using them, others could not disturb him; but when he had ceased to use them, if they were not things which were consumed by the fact of use, the things immediately re-entered into the negative community, and another could use them. The human race having multiplied, men partitioned among themselves the earth and the greater part of those things which were on its surface. That which fell to each one among them commenced to belong to him in private ownership, and this process is the origin of the right of property. Some things, however, did not enter into this division, and remain, therefore, to this day, in the condition of the ancient and negative community." No. 21.

Referring to those things which remain common, or in what he qualified as the negative community, this great writer says:

"These things are those which the jurisconsults called 'res communes.' Marcien refers to several kinds,—the air, the water which runs in the rivers, the sea and its shores. * * * As regards wild animals, feræ naturæ, they have remained in the ancient state of negative community."

In both the works of Merlin and Pothier, ubi supra, will be found a full reference to the history of the varying control exercised by the law-giving power over the right of a citizen to acquire a qualified ownership in animals feræ naturæ, evidenced by the regulation thereof by the Salic law, already referred to, exemplified by the legislation of Charlemagne, and continuing through all vicissitudes of governmental authority. This unbroken line of law and precedent is summed up by the provisions of the Code Napoleon, which declares (articles 714, 715):

"There are things which belong to no one, and the use of which is common to all. Police regulations direct the manner in which they may be enjoyed. The faculty of hunting and fishing is also regulated by special laws." Like recognition of the fundamental principle upon which the property in game rests has led to similar history and identical results in the common law of Germany, in the law of Austria, Italy, and, indeed, it may be safely said in the law of all the countries of Europe. 1 Saint Joseph Concordance, p. 68.

The common law of England also based property in game upon the principle of common ownership, and therefore treated it as subject to governmental authority.

Blackstone, while pointing out the distinction between things private and those which are common, rests the right of an individual to reduce a part of this common property to possession, and thus acquire a qualified ownership in it, on no other or different principle from that upon which the civilians based such right. 2 Bl. Comm. 1, 12.

Referring especially to the common ownership of game, he says:

"But, after all, there are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common, being such wherein nothing but an usufructuary property is capable of being had; and therefore they still belong to the first occupant during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air, and water, which a man may occupy by means of his windows, his gardens, his mills, and other conveniences. Such, also, are the generality of those animals which are said to be feræ naturæ or of a wild and untamable disposition, which any man may seize upon or keep for his own use or pleasure." 2 Bl. Comm. 14.

While the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the state, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good. Therefore, for the purpose of exercising this power, the state, as held by this court in Martin v. Waddell, 16 Pet. 410, represents its people, and the ownership is that of the people in their united sovereignty.

The same view has been expressed by the supreme court of Minnesota, as follows:

"We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as a proprietor, but in its sovereign

capacity, as the representative and for the benefit of all its people in common." State v. Rodman, supra.

The foregoing analysis of the principles upon which alone rests the right of an individual to acquire a qualified ownership in game, and the power of the state, deduced therefrom, to control such ownership for the common benefit, clearly demonstrates the validity of the statute of the state of Connecticut here in controversy. The sole consequence of the provision forbidding the transportation of game killed within the state, beyond the state, is to confine the use of such game to those who own it—the people of that state. The proposition that the state may not forbid carrying it beyond her limits involves, therefore, the contention that a state cannot allow its own people the enjoyment of the benefits of the property belonging to them in common, without at the same time permitting the citizens of other states to participate in that which they do not own.

Mr. Justice BREWER and Mr. Justice PECKHAM, not having heard the argument, took no part in the decision of this cause.

FIELD, J., dissenting.

I am unable to agree with the majority of my associates in the affirmation of the judgment of the supreme court of errors of Connecticut in this case, and I will state, briefly, the grounds of my disagreement.

When any animal, whether living in the waters of the state or in the air above, is lawfully killed for the purposes of food or other uses of man, it becomes an article of commerce, and its use cannot be limited to the citizens of one state to the exclusion of citizens of another state. Although there are declarations of some courts that the state possesses a property in its wild game, and, when it authorizes the game to be killed and sold as an article of food, it may limit the sale only for domestic consumption, and the supreme court of errors of Connecticut, in deciding the present case, appears to have held that doctrine, I am unable to assent to its soundness, where the state has never had the game in its possession or under its control or use. I do not admit that in such case there is any specific property held by the state by which, in the exercise of its rightful authority, it can lawfully limit the control and use of the ani-

mals killed to particular classes of persons or citizens, or to citizens of particular places or states. But, on the contrary, I hold that where animals within a state, whether living in its waters or in the air above, are, at the time, beyond the reach or control of man, so that they cannot be subjected to his use or that of the state in any respect, they are not the property of the state or of any one in a proper sense. I hold that, until they are brought into subjection or use by the labor or skill of man, they are not the property of anyone, and that they only become the property of man according to the extent to which they are subjected by his labor or skill to his use and benefit. When man, by his labor or skill, brings any such animals under his control and subject to his use, he acquires to that extent a right of property in them, and the ownership of others in the animals is limited by the extent and right thus acquired. This is a generally recognized doctrine, acknowledged by all states of Christendom. It is the doctrine of law, both natural and positive. The Roman law, as stated in the Digest, cited in the opinion of the majority, expresses it as follows: "That which belongs to nobody is acquired by the natural law by the person who first possesses it." A bird may fly at such height as to be beyond the reach of man or his skill, and no one can then assert any right of property in such bird; it cannot, then, be said to belong to any one. But when, from any cause, the bird is brought within the reach and control or use of man, it becomes at that instant his property, and may be an article of commerce between him and citizens of the same or of other states.

In an opinion written by me some years since, I had occasion to speak of this rule of law. I there said that it was a general principle of law, both natural and positive, that where a subject, animate or inanimate, which otherwise could not be brought under the control or use of man, is reduced to such control or use by his individual labor or skill, a right of property in it is acquired. The wild bird in the air belongs to no one, but when the fowler brings it to earth and takes it into his possession, it is his property. He has reduced it to his control by his own labor, and the law of nature and the law of society recognize his exclusive right to it. The pearl at the bottom of the sea belongs to no one, but the diver who enters the water and brings it to light has property in the gem. He has by his own labor

reduced it to possession, and, in all communities and by all law, his right to it is recognized. So the trapper on the plains and the hunter in the North have a property in the furs they have gathered, though the animals from which they were taken roamed at large, and belonged to no one. They have added by their labor to the uses of man an article promoting his comfort, which, without that labor, would have been lost to him. They have a right, therefore, to the furs, and every court in Christendom would maintain it. So, when the fisherman drags by his net fish from the sea, he has a property in them, of which no one is permitted to despoil him. Water Works v. Schottler, 110 U. S. 374, 4 Sup. Ct. 48.

[Portions of the opinion are omitted. Mr. Justice HARLAN also dissented.]

CHAPTER III.

TITLE BY FINDING.

Finder's Title As Affected by Ownership of the Soil.

WEEKS v. HACKETT.

104 Me. 264, 71 Atl. 858. 1908.

Exceptions from Supreme Judicial Court, Franklin County.

Separate actions of trover by Orlando Weeks and by Edwin E. Morton against Fessenden E. Hackett. Verdict for each plaintiff, and defendant excepts and moves to set aside the verdicts. Exceptions and motions overruled.

Actions of trover, one by each plaintiff brought to recover one-third in value of a certain quantity of coins of the United States and of certain foreign coins, alleged to have been found by each plaintiff jointly with the other plaintiff and with the defendant in three metallic cans buried and concealed in the soil and underneath the surface of land owned by one Leonard J. Hackett in the town of New Vineyard.

WHITEHOUSE, J. These were actions of trover brought by each of these plaintiffs to recover one-third in value of a certain quantity of coins of the United States and of certain foreign coins, alleged to have been found by each plaintiff jointly with the other and with the defendant, Fessenden E. Hackett. It is not in controversy that the coins in question of the aggregate par value of $1,284.67 were found contained in the soil and underneath the surface of land owned by one Leonard J. Hackett in the town of New Vineyard, and it appears in evidence that after the coins were found, and prior to the commencement of these actions, the defendant, Fessenden E. Hackett, purchased all the right, title, and interest, if any, which Leonard J. Hackett had in and to these coins as owner of the land where they were found.

Three contentions were set up in defense:

(1) That the defendant found the coins under circumstances which made him the sole owner of them as against these plaintiffs.

(2) That if the plaintiffs participated in the finding, they are joint tenants or tenants in common with the defendant, that he is entitled to hold the coins in trust for the true owner, and that the plaintiffs, as tenants in common, cannot maintain trover against him for their respective shares.

(3) That the defendant became the sole owner of the coins by purchase from Leonard J. Hackett, the owner of the premises where they were found.

The presiding justice did not sustain the legal propositions involved in these contentions of the defendant, but instructed the jury, in substance: That gold or silver coin deposited in the soil, as this appeared to have been, became what is known in law as treasure-trove, the title to which does not pass with the soil, and that the owner of the premises where the coin was found acquired no title to it by virtue of his ownership of the land, and that the defendant consequently acquired no title by purchase from Leonard J. Hackett; that if the coin was purposely buried in the soil and forgotten, or its place of concealment remained undisclosed by reason of the death of the depositor, the finder acquired a right to the possession of it and a qualified property in it, subject to the right of the true owner when he appeared, and in that sense became a trustee for the owner, but, if several participated in the finding so as to become joint finders with equal rights, the ownership pertained to all of them, and one of them was not authorized to hold exclusive possession as against his fellows; and, finally, that since the coins were separable and divisible by weight or count, if the defendant refused to deliver to each of such tenants in common the share to which he was entitled, an action of trover would lie against the defendant for the conversion of such number or portion of the coins as rightfully belonged to each of the joint finders.

The jury returned a verdict in favor of each plaintiff for the sum of $291.20, being one-third of the aggregate market value of the coins, and the cases come to the law court on exceptions to these instructions and on a motion to set aside the verdicts as against the law and the evidence.

1. It is the opinion of the court that the instructions given

by the presiding justice were correct, and that the exceptions must be overruled.

"Treasure-trove" is a name given by the early common law to any gold or silver in coin, plate, or bullion found concealed in the earth, or in a house or other private place, but not lying on the ground; the owner of the discovered treasure being unknown. 1 Black. 295; Cyc. vol. 19, p. 339; A. & E. Encyc. of Law, vol. 28, p. 472; Livermore v. White, 74 Me. 452, 43 Am. Rep. 600; Sovern v. Yoran, 16 Or. 269, 20 Pac. 100, 8 Am. St. Rep. 293. To what extent the doctrine of the English common law in regard to treasure-trove has been merged, in this country, into the law respecting the finding of lost property, and whether, in modern commercial life, the term "treasure-trove" may be held to include not only gold and silver, but the paper representatives of them, are questions not necessary to be considered here (see Huthmacher v. Harris' Adm'rs, 38 Pa. 499, 80 Am. Dec. 502, and Danielson v. Roberts et al., 44 Or. 108, 74 Pac. 913, 65 L. R. A. 526, 102 Am. St. Rep. 627), for while it is not in controversy that the coins here in question clearly fall within the common-law definition of "treasure-trove," the general rule is established by a substantially uniform line of decisions in the American states, with respect to both lost goods, properly so termed, and treasure-trove, that, in the absence of legislation upon the subject, the title to such property belongs to the finder as against all the world except the true owner and that ordinarily the place where it is found is immaterial. Lawrence v. Buck, 62 Me. 275; Durfee v. Jones, 11 R. I. 588, 23 Am. Rep. 528; Hamaker v. Blanchard, 90 Pa. 377, 35 Am. Rep. 664; Bowen v. Sullivan, 62 Ind. 281, 30 Am. Rep. 172; Danielson v. Roberts, 44 Or. 108, 74 Pac. 913, 65 L. R. A. 526, 102 Am. St. Rep. 627; Armory v. Delamarie, 1 Strange, 504, 1 Smith's Lead. Cases, 631; Bridges v. Hawkesworth, 7 Eng. Law & Eq. 424, 21 L. J. Q. B. 75. The owner of the soil in which treasure-trove is found acquires no title thereto by virtue of his ownership of the land. Reg. v. Thomas, Leigh & Cave Eng. Cr. Cases; 28 A. & E. Enc. of Law (2d Ed.) 473. According to Bracton lib. 3, c. 3, as quoted in Viner's Abridgment: "He to whom the property is shall have treasure-trove, and if he die before it be found, his executors shall have it, for nothing accrues to the King unless when no one knows who hid that treasure." And

according to Lord Coke (3 Inst. 132), the common law originally left treasure-trove to the person who deposited it, or, upon his omission to claim it, to the finder. 2 Kent's Com. 458. The rule of the common law respecting the rights and duties of the finder of lost money or goods has been variously modified by the terms and provisions of local statutes of many states, but the provisions of the Maine statutes (Rev. St. c. 100, § 10 et seq.) have no reference to the law of treasure-trove.

In Danielson et al. v. Roberts et al., 44 Or. 108, 74 Pac. 913, 65 L. R. A. 526, 102 Am. St. Rep. 627, in which the facts were strikingly analogous to those at bar, two boys unearthed on the defendants' premises an old tin can containing gold coin of the value of $7,000. The circumstances under which the money was discovered, the rust-eaten condition of the can in which it was contained, and the place of deposit, tended strongly to show that it had been buried for a long time, and that the owner was probably dead or unknown. It was held that the fact the money was found on the premises of the defendants in no way affected the plaintiffs' right to possession or their duty in relation to the treasure, and that they could maintain trover therefor against the defendants to whom they had been induced to deliver the money. In a well-reasoned opinion, the court say:

"Ever since the early case of Armory v. Delamarie, 1 Strange, 504, where it was held that the finder of a jewel might maintain trover for the conversion thereof by a wrong-doer, the right of the finder of lost property to retain it against all persons except the true owner has been recognized. In that case a chimney sweeper's boy found a jewel and carried it to a goldsmith to ascertain what it was. The goldsmith refused to return it, and it was held that the boy might maintain trover on the ground that by the finding he had acquired such a property in the jewel as would entitle him to keep it against all persons but the rightful owner. This case has been uniformly followed in England and America, and the law upon this point is well settled. Sovern v. Yoran, 16 Or. 269, 20 Pac. 100, 8 Am. St. Rep. 293; 19 Am. & Eng. Ency. Law (2d Ed.) 579. But it is argued that property is lost, in the legal sense of that word, only when the possession has been casually and involuntarily parted with, and not when the owner purposely and voluntarily places or deposits it in a certain place for safe-keeping, although

he may thereafter forget it, and leave it where deposited, or may die without disclosing to any one the place of deposit.

"But at the present stage of the controversy it is immaterial whether the money discovered by plaintiffs was technically lost property or treasure-trove, or, if treasure-trove, whether it belongs to the state or the finder, or should be disposed of as lost property if no owner is discovered. In either event the plaintiffs are entitled to the possession of the money as against the defendants, unless the latter can show a better title. The reason of the rule giving the finder of lost property the right to retain it against all persons except the true owner applies with equal force and reason to money found hidden or secreted in the earth as to property found on the surface."

In Durfee v. Jones, 11 R. I. 588, 23 Am. Rep. 528, the plaintiff bought an old safe and soon afterwards, through his agent, left it for sale, with the defendant, who was a blacksmith. Upon examination of it soon after it was left with him the defendant found secreted between the exterior and the lining a roll of bank bills amounting to $165. Neither the plaintiff nor the defendant knew the money was there before it was found, and the owner was unknown. The plaintiff brought suit against the defendant to recover the money, claiming that as owner of the safe he was entitled to the money by right of prior possession; but the court held that the plaintiff "never had any possession of the money except unwittingly, by having possession of the safe which contained it; that although it was originally deposited in the safe by design, it was not so deposited after the safe became the property of the plaintiff, so as to be in the protection of the safe, as his safe, or so as to affect him with any responsibility for it," and it was accordingly held that the defendant, as finder of the money, was entitled to retain it as against the plaintiff, the owner of the safe, and as against all the world except the real owner.

In Bowen v. Sullivan, 62 Ind. 281, 30 Am. Rep. 172, the plaintiff, while engaged as an employe in the defendant's paper mill, found two $50 bank bills, in a clean unmarked envelope, in a bale of old paper which the defendant had bought for manufacture, and delivered the bills to the defendant for the purpose of ascertaining if they were good and upon his promise to return them. The defendant refusing to return them, the

plaintiff brought suit to recover their value, and the court held that she was entitled to recover, citing among other cases, Lawrence v. Buck, 62 Me. 275; Durfee v. Jones, 11 R. I. 588, 23 Am. Rep. 528, and Armory v. Delamarie, 1 Strange, 505, supra, and stating that the place of the finding was ordinarily immaterial.

The result therefore seems unquestionable that, in the case at bar, the coins sued for belonged to the finder or finders as against all the world except the true owner, or his legal representatives, when discovered. Indeed the defendant's counsel does not seriously contend to the contrary, but, as already noted, he claims under the motion that the defendant was in fact the sole finder of the coins, and further insists under the exceptions that, in any event, these actions are not maintainable for the reason that an action of trover will not lie in favor of one tenant in common against his original co-tenant.

With respect to things so far indivisible in their nature that the share of one cannot be distinguished from that of the other, it is undoubtedly a well-established rule that one tenant in common cannot maintain trover against his co-tenant for the reason that the two are equally entitled to possession, and the one who has it cannot be guilty of conversion by retaining it; but this rule "can have no reasonable application to such commodities as are readily divisible by tale or measure into portions absolutely alike in quality, such as grain or money." Cooley on Torts (2d Ed.) p. 533. Cessante ratione legis, cessat ipsa lex. If A and B are tenants in common of a car load of corn, and B, denying A's right to any part of it, refuses to surrender his half on demand, this is deemed in law a conversion, because the commodity would be capable of exact division by weight or measure, and by refusing to surrender A's half B exercised a dominion over it inconsistent with A's rights. As observed by the court in Pickering v. Moore, 67 N. H. 536, 32 Atl. 830, 31 L. R. A. 698, 68 Am. St. Rep. 695: "One is entitled to the possession of the whole in those cases only where it is necessary to his enjoyment of his moiety. Here it is not necessary. There is no more difficulty in separating one portion from another than there is in selecting A's marked sheep from B's flock. Either may make the division. The law is not so unreasonable as to compel a resort to the courts in order to

obtain a partition which either may make without expense and without danger of injustice to his co-tenant." See, also, Fiquet v. Allison, 12 Mich. 328, 86 Am. Dec. 54; Ripley v. Davis, 15 Mich. 75, 90 Am. Dec. 262; Gates v. Bowers, 169 N. Y. 14, 61 N. E. 993, 88 Am. St. Rep. 530; German Nat. Bank v. Meadowcroft, 95 Ill. 124, 35 Am. Rep. 137.

It is also familiar law that absolute and unqualified ownership of a chattel is not essential to enable one to maintain trover for its conversion. Either a general or special property in the plaintiff with the right of possession at the time of the conversion will be sufficient. It has been seen that, in all the cases above cited in which it has been held that the finder of lost property is entitled to retain possession of it as against all the world until the rightful owner appears, it was also held that the finder had a special or qualified property in the thing found sufficient to enable him to maintain trover for its conversion against any one except the true owner.

Upon the assumption then that the plaintiffs and the defendant were joint finders, and therefore tenants in common, of the coin contained in the cans found in the case at bar, each was entitled to possession of one-third of it and charged with the duty of holding it for the true owner if he could be ascertained. He was under obligations to exercise reasonable care to safely keep his share of it and be prepared to restore it to the true owner whenever he might appear, and was therefore authorized to maintain such action as might be necessary to entitle him to retain or recover possession of it. The coins were readily divisible into three parts by counting and weighing, but the defendant denied the plaintiffs' rights and refused to surrender any part of the coin. This was effectually a conversion of their respective shares as tenants in common, and an action of trover was the appropriate remedy for each plaintiff.

* * * * * * *

Exceptions and motions overruled.

CHAPTER IV.

ACQUISITION OF TITLE BY ADVERSE POSSESSION UNDER STATUTE OF LIMITATIONS.

Requisites of Adverse Possession.

LIGHTFOOT v. DAVIS.

198 N. Y. 261, 91 N. E. 582. 1910.

Action by William Lightfoot against Fitch M. Davis, administrator of William Bowen, deceased. From an order of the Appellate Division (132 App. Div. 452, 116 N. Y. Supp. 904), reversing, on the law alone, a judgment of the Special Term for plaintiff on report of a referee, plaintiff appeals. Reversed.

CULLEN, C. J. This is a singular case. In March, 1875, and for some years previous, the plaintiff had been the owner of several school bonds issued by various counties in the state of Kansas, aggregating in amount the sum of $4,000. These, together with a memorandum stating the numbers and other details of the bonds, he kept locked in a bureau drawer. At the time mentioned, during the plaintiff's absence, the drawer was broken open, and the bonds abstracted by the defendant's testator, the plaintiff's father-in-law and a banker in the village of Lima in this state. No suspicion seems ever to have attached to the deceased during his life. The plaintiff made every effort to discover the bonds, and who had purloined them. The only record of their numbers was the memorandum taken with the bonds. He was therefore unable to stop their payment or to trace them. He had bought these bonds originally through the deceased, and immediately after their loss gave him notice of that fact. In response the deceased wrote him: "I am going to Hamilton Station to-morrow. If you will bring over all the records you have of the lost bonds I will look at them and will try and notify the districts of the loss and stop payment." The plaintiff was never able to obtain any further information as

to the bonds. They matured within a few years, and the interest as it accrued and the principal was collected by the deceased. Upon his death in 1899 there was found among his papers the memorandum which had been stolen from the plaintiff, and an examination of his books showed that he had collected the bonds. Upon the discovery of these facts the plaintiff brought this suit against the defendant, as administrator with the will annexed of the deceased, praying judgment that the defendant "may account and pay over to him the amount of said bonds, and the income thereof if it can be traced, and, if it cannot be traced, that he may have judgment against" the defendant as administrator for the sum of $16,000. The answer denied any knowledge or belief as to the facts charged, and interposed both the 6 and 10 years' statute of limitations. The referee before whom the case was tried found all the facts as hitherto recited, and awarded judgment to the plaintiff for the principal of said bonds and the interest thereon. The learned Appellate Division reversed the judgment on questions of law alone, leaving undisturbed the facts as found by the referee. It held, on the authority of Allen v. Mille, 17 Wend. 202, and Burt v. Myers, 37 Hun, 277, that the plaintiff's claim was barred by the statute of limitations, despite his ignorance of the fact that the deceased had purloined the bonds.

The principle involved in this case is a far-reaching one. During the last 30 years there have been a number of bank robberies where by burglary very large amounts of securities have been stolen, and it has frequently proved impossible to detect the thieves or secure a return of the stolen property, except in some cases by negotiations through "fences" or agents of the criminals. These securities are often, if not generally, long-time bonds not maturing until after the expiration of the six-year statutory period for bringing actions for conversion. If it be the law that a thief, by avoiding detection and concealing the stolen property during that period, may acquire title to the property, or secure immunity from suit for its proceeds in case he has sold it, certainly we should call the attention of the Legislature to the defect in the law in order that it might be remedied. In my opinion, however, since the adoption of the Code of Civil Procedure in 1876 the law is in no such unfortunate condition, and appeal for legislative relief is unnecessary.

The first question to be considered is whether the lapse of time would have vested good title in the defendant's testator had he remained in possession of the bonds until the time of his decease, for if such were the law, it is clear that he did not become liable because, instead of retaining the bonds, he collected the money due thereon. The law is settled in this state that, while the statute of limitations may bar the remedy, it does not cancel or discharge the debt. Hulbert v. Clark, 128 N. Y. 295, 28 N. E. 638, 14 L. R. A. 59. This general doctrine is subject to the qualification that the statute may operate to transfer title to property. Thus, in the case of our statutory provisions as to the adverse possession of real property, the statute not only bars the remedy, but confers title on the party who has held the land adversely during the prescribed period. Baker v. Oakwood, 123 N. Y. 16, 25 N. E. 312, 10 L. R. A. 387. We have in our state, however, no statute relating to the adverse possession of chattels or personal property, nor do I know of any in any other state. Nevertheless, it seems to be the generally accepted doctrine that by adverse possession title to chattels may be acquired which will be paramount to that of the true owner. Though there are no decisions in our courts on the question, they are numerous in other jurisdictions. Brent v. Chapman, 5 Cranch, 358, 3 L. Ed. 125; Layne v. Norris, 16 Gratt. (Va.) 236; Newby v. Blakey, 3 Hen. & Mun. (Va.) 57; Dragoo v. Cooper, 72 Ky. (9 Bush) 629; Carr v. Barnett, 21 Ill. App. 137; Gaillard v. Hudson, 81 Ga. 738, 8 S. E. 534; Connor v. Hawkins, 71 Tex. 582, 9 S. W. 684; Chapin v. Freeland, 142 Mass. 383, 8 N. E. 128, 56 Am. St. Rep. 701.

In Campbell v. Holt, 115 U. S. 620, 623, 6 Sup. Ct. 209, 210 (29 L. Ed. 483), in discussing the power of the Legislature to revive an outlawed debt by repeal of the statute of limitations, Judge Miller wrote: "Possession has always been a means of acquiring title to property. It was the earliest mode recognized by mankind of the appropriation of anything tangible by one person to his own use, to the exclusion of others, and legislators and publicists have always acknowledged its efficacy in confirming or creating title. The English and American statutes of limitation have in many cases the same effect; and, if there is any conflict in the decisions upon the subject, the weight of authority is in favor of the proposi-

tion that, where one has had the peaceable, undisturbed, open possession of real or personal property, with an assertion of his ownership, for the period which, under the law, would bar an action for its recovery by the real owner, the former has acquired a good title—a title superior to that of the latter, whose neglect to avail himself of his legal rights has lost him his title. This doctrine has been repeatedly asserted in this court. Leffingwell v. Warren, 2 Black, 599 [17 L. Ed. 261]; Croxall v. Shererd, 5 Wall, 268, 289 [18 L. Ed. 572]; Dickerson v. Colgrove, 100 U. S. 578, 583 [25 L. Ed. 618]; Bicknell v. Comstock, 113 U. S. 149, 152 [5 Sup. Ct. 399, 28 L. Ed. 962]. It is the doctrine of the English courts, and has often been asserted in the highest courts of the states of the Union." This statement is cited in the opinion rendered in Baker v. Oakwood, supra; and, though that case involved only the title to real property, we accepted it as a correct exposition of the law. But none of the cases involved the power of a thief to acquire title by lapse of time where he had concealed the property. Judge Miller speaks of a case where the possession is "peaceable, undisturbed, open, * * * with an assertion of his ownership," and it is apparent that, if title to personal property may be acquired by possession in analogy to the acquisition of that to real property, that possession must have the qualifications stated. From the earliest period in our state it has been uniformly held that mere possession of real estate, continued however long, will not divest the owner of his property unless the possession is under a claim of title. Otherwise the possession will be presumed to be in subordination to the true legal title. Gansevoort v. Parker, 3 Johns. Cas. 124; Poor v. Horton, 15 Barb. 485; Doherty v. Matsell, 119 N. Y. 646, 23 N. E. 994. The nature of the possession required by the statute necessarily makes it open and public.

In many of the cases cited from other states the fact that defendant was a purchaser in good faith, and his possession open and public, is emphasized in the opinions of the courts. In Dragoo v. Cooper, supra, it was admitted that the defendants, who were purchasers of the property, acted in good faith. Judge Lindsay said: "Dragoo does not acquire title to the horse in controversy by reason of Lewis's purchase from the thief, who could have no title, but by virtue of the possession under claim of title, con-

tinuing in himself and Lewis for more than five years before the institution of the action." In Newby v. Blakey, supra, the judgment of the court was that the long and peaceable possession of the slaves in question, acquired without force or fraud, gave to Oswald Newby a legal title to them. In Carr v. Barnett, supra, the court said: "There was no concealment, fraudulent or otherwise, of his possession and claim, but the facts were unknown to the plaintiff until a short time before the suit was brought." In Connor v. Hawkins, supra, it was said: "Her [defendant's] possession was adverse, public, and continuous." In Gaillard v. Hudson, supra, the court said: "The defendant to the possessory warrant, and those under whom he claimed, had been in the peaceable, quiet, and honest possession of this property for more than four years next immediately preceding the issuing of the warrant. They had bought the property and paid a fair price for it."

At the same time it is declared, and the declaration constantly reiterated in text-books and decisions, that a thief can acquire no title to the stolen property. Silsbury v. McCoon, 3 N. Y. 379, 53 Am. Dec. 307; Bassett v. Spofford, 45 N. Y. 387, 6 Am. Rep. 101. If the acquisition of personal property by adverse possession rests on analogy to the law relating to real property—and that is the ground on which it seems to rest—it is clear that the possession must be under claim of right, and open, public, and notorious. Where a person obtains possession of property secretly by a common-law larceny, and conceals that possession, no lapse of time should confer title on the thief. The contrary doctrine seems to me shocking, both in morals and to common sense. Had the bonds remained in the possession of the defendant's testator, the plaintiff, on discovering that fact, might have recovered possession of them by legal process. Chapin v. Freeland, supra, was an action of replevin for two counters which had been affixed to the floor of a shop. Afterwards, through the foreclosure of a mortgage, the premises were sold, the counters removed therefrom, and subsequently sold to the plaintiff. The defendant claimed to be their original owner, and took them from the plaintiff. Before the defendant regained possession the statute of limitations had run. There was no question of the plaintiff's good faith, or of his possession being public and known to the defendant. It

was there held that, where the statute would be a bar to a direct proceeding by the original owner, it could not be defeated by indirection. "If he cannot replevy, he cannot take with his own hand. A title which will not sustain a declaration will not sustain a plea." Under the authorities we have cited it was properly held, I think, that as the defendant could not have regained it by legal process, he could not resort to force to reclaim his property. The converse of the proposition seems to me equally true that, if the original owner has not by lapse of time lost title to the property, he is not barred from maintaining legal proceedings to recover possession of it. * * *

I think the order of the Appellate Division should be reversed, and the judgment of the trial court for plaintiff affirmed, with costs in both courts.

CHAPTER VI.

TITLE TO INTELLECTUAL PRODUCTS.

Literary Property at Common Law.

PRESS PUB. CO. v. MONROE.

73 Fed. 196. 1896.

In Error to the Circuit Court of the United States for the Southern District of New York.

This case comes here on writ of error to review a judgment of the circuit court, Southern district of New York, entered December 19, 1894, upon a verdict for $5,000 in favor of defendant in error, who was plaintiff below. The action was for damages for unlawfully publishing in the World newspaper a poem written by the plaintiff to be delivered on the occasion of the dedication of the Columbian Exposition, or World's Fair, in Chicago.

LACOMBE, J. At the time when preparations were being made for the opening ceremonies of the World's Fair, or Columbian Exposition, in Chicago, plaintiff, a resident of that city, who was engaged in the literary profession, had published poems and prose writings, and had an excellent reputation as an authoress, was invited by the committee on ceremonies to write and deliver a poem at the dedicatory exercises. That invitation was given March, 1891. The dedicatory exercises were had on October 21, 1892, in the presence of a vast concourse of people. They included the delivery of addresses by orators of well-known ability. No effort was spared to make them effective, and they were, by reason of the event which they commemorated, of exceptional interest to the country at large. For the public utterances of orator or poet who had been selected to speak on that day and in that place, the occasion was unique. The plaintiff accepted the invitation, and after many months of careful work produced an ode of some 400 lines. After it had been shown to the committee on ceremonies, and suggestions made as to

changes, she revised it, reducing its length to about 375 lines, and delivering the final revised version to the committee on September 20, 1892. Fifty-six lines of the ode were lyrical songs, intended to be sung. The original version of the ode was shown to a Mr. Chadwick, who wrote the music for these songs, and the 56 lines were published with the music so composed, in order to properly rehearse the chorus. Except of these 56 lines, there had, down to this time, been no publication of the ode by the plaintiff or by any one else. The copies which were given to the members of the committee on ceremonies and to a so-called "literary committee" were delivered to them solely to enable them to decide whether the poem was one suitable and worthy of their acceptance as the ode to be delivered at the opening exercises. Such a delivery of copies of a literary production is not a publication, and could not prejudice the owner's common-law rights. Bartlett v. Crittenden, 4 McLean, 300, Fed. Cas. No. 1,082; Id., 5 McLean, 32, Fed. Cas. No. 1,076.

On September 23, 1892, plaintiff met the acting chairman of the committee on ceremonies, who informed her that the poem was satisfactory, and the matter arranged, and paid her $1,000, whereupon she signed the following receipt:

"Received, Chicago, the 23rd day of September, 1892, from the World's Columbian Exposition, one thousand dollars ($1,000) in full payment for ode composed by me.

"It is understood and agreed that said Exposition company shall have the right to furnish copies for publication to the newspaper press of the world, and copies for free disposition, if desired, and also may publish same in the official history of the dedicatory ceremonies; and, subject to the concession herein made, the author expressly reserves her copyright therein.

Harriet Monroe."

The first question to be determined—and it is the important question in the case—is what property rights to the ode remained to the plaintiff after September 23, 1892. The evidence indicates that the receipt quoted above expressed, item by item, the conditions of the contract between Miss Monroe and the committee, which was not otherwise reduced to writing. The defendant contends that by the first clause of this receipt she transferred to the committee her entire common-law right of property in the manuscript; that the residue of the receipt is a nullity; that

it cannot be construed as impairing in any way the full rights of ownership given by the first clause; that the second paragraph was intended only as a reservation of the right to take out a copyright under the United States statute, and was powerless to secure even that, since publication without the statutory copyright notice is authorized, and, the poem being once thus published, all right to restrain future piracy would be lost. We are unable to accept this construction. The whole instrument is to be construed together, and manifestly it contemplates something short of a complete transfer of all right to the committee. A reservation by the author, "subject to the concession herein made, * * * of her copyright in the poem," imports a reservation of common-law as well as of statutory copyright, and it must be made clear, either upon the face of the instrument itself or otherwise by competent proof, that the word "copyright" was used in some more restricted sense. To the committee was given not only the right to have the poem delivered on the occasion of the dedicatory ceremonies, but also the right to publish it in the official history thereof, and the right to furnish copies for publication to the newspaper press of the world, and the right to furnish copies for free distribution. This was all the committee needed for its purposes, and, having secured all it needed, there is nothing surprising in its leaving all other rights to the author. When the committee chose to avail of its concession, and publish the poem, that act would terminate the common-law copyright, but until publication that right survived, and by the terms of the agreement was not conveyed to the committee, but reserved to the author. Any unauthorized publication would be a trespass upon that right of property, and right of action therefor would still be in the author.

The contention of the plaintiff in error that the passage by congress of the copyright statutes has abrogated the common-law right of an author to his unpublished manuscript, is unsupported by authority. These statutes secure and regulate the exclusive property in the future publication of the work after the author shall have published it to the world. But this is a very different right from the ownership and control of the manuscript before publication. "That an author, at common law, has a property in his manuscript, and may obtain redress

against any one who deprives him of it, or, by improperly obtaining a copy, endeavors to realize a profit by its publication, cannot be doubted. * * * The argument that a literary man is as much entitled to the product of his labor as any other member of society, cannot be controverted, * * * [at least until] he shall have sold it publicly." Wheaton v. Peters, 8 Pet. 657, 658. And that common-law right may be enforced in the federal courts whenever diversity of citizenship gives those courts jurisdiction of the parties, irrespective of whatever additional means of redress are provided by section 9 of the act of congress of February 3, 1831, now section 4967, Rev. St. U. S. See Bartlett v. Crittenden, 4 McLean, 300, Fed. Cas. No. 1,082; Id., 5 McLean, 32, Fed. Cas. No. 1,076; Keene v. Wheatley, 9 Am. Law. Reg. 33, Fed. Cas. No. 7,644; Palmer v. De Witt, 47 N. Y. 532. The various assignments of error, therefore, which cover both the refusal of the court to direct a verdict in favor of defendant and also so much of the charge as instructed the jury that plaintiff had property rights which would be trespassed upon by an unauthorized publication of her ode, are unsound.

On September 23d—the day when the money was paid and the receipt signed—the New York World, a newspaper published by defendant, received a telegram from one Fay, its agent in Chicago, saying that a copy of the ode could be obtained for $150, and asking whether it should be paid, and the ode procured. On the next day the managing editor of the World directed its purchase, and ordered it sent that afternoon and night to the World by telegraph. While the ode was in transit, a message was received from the Associated Press to the effect that it was understood that a copy of the ode had gotten out somehow, and that its publication was forbidden, on the ground that it was copyrighted. Fay was thereupon communicated with, and replied that the copy which he had did not have any copyrighting words upon it, and that there was no indication upon it that it was copyrighted. Thereupon, and on September 24th, the following dispatch was sent to Fay in Chicago:

"We will take our chances on it. Interview Miss Monroe to-morrow, and get a good talk with her about ode and literature generally. Explain to her that the World could not miss an opportunity to give the public such a grand poem, and tell her

how much better to have the World treat it as it will to-morrow, making it the great feature of the day, than to have it peddled around among the little papers. The World."

The ode was printed in full in the issue of the paper of Sunday, September 25th, with comments upon it, a sketch of Miss Monroe, and what purported to be a portrait of her. Fay was not put on the witness stand, nor was any evidence offered to show how the copy which he bought had been obtained. The court instructed the jury that if they found "it was obtained and sold to the defendant against the mind and will and without the authority and consent of both the Exposition company and Miss Monroe, the act of publication was a wrongful violation of her rights," and that "upon that issue the plaintiff had the burden of proof." The jury were further instructed that in actions of trespass to personal property, or in actions for injury to personal property, when the circumstances showed gross or wanton or malicious disregard by the defendant of the rights of the plaintiff, the jury would have a right to give exemplary damages in excess of any actual loss which was suffered. The testimony in the case warranted the jury in finding that the defendant had reason to know that the poem had not theretofore been published; that it was the wish and intention, both of the Exposition committee and of the plaintiff, to withhold it from publication until, in the language of the circuit judge, "it should be presented to the audience with all the advantages which the enthusiasm of the occasion could give, and unmarred by criticism or comment, either polite or impolite." The managing editor testified that he knew the ode belonged to the World's Fair, and that he made no inquiry of the World's Fair committee as to whether he had any right to buy it or not; that as to the question whether an editor of a newspaper has the right to publish a literary work unless the owner consents to it, he left that matter to be settled by the lawyers; and added, "Under some circumstances, I believe that I have the right, as an editor, to publish the manuscript of a person without that person's consent." This is a restatement of the proposition so frequently advanced, when newspapers happen to be defendants, that the person or property rights of individuals are entitled to receive no consideration at the hands of the public press whenever a violation of those rights may, in the opinion of

the editor, promote the entertainment of the purchasers of his paper. Testimony such as this was abundantly sufficient to warrant the jury in finding that the publication of the plaintiff's ode in the World newspaper was the result of "that wanton and reckless indifference to the rights of others which is equivalent to an intentional violation of them." Railroad Co. v. Arms, 91 U. S. 489. In view of the testimony of the principal witness for the defendant, it seems to have escaped on this occasion with a light verdict.

Plaintiff in error contends that the court erred in instructing the jury that it might award exemplary damages. That in certain classes of cases juries are authorized to give punitive or exemplary damages to punish a wrongdoer and to deter others from the commission of a like wrong is well-settled law in the federal courts and in the courts of this state. Day v. Woodworth, 13 How. 370; Railroad Co. v. Arms, 91 U. S. 489; Voltz v. Blackmar, 64 N. Y. 440. * * *

Copyright Statutes.

HOLMES v. HURST.

174 U. S. 82, 19 Sup. Ct. Rep. 606. 1899.

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

This was a bill in equity by the executor of the will of the late Dr. Oliver Wendell Holmes, praying for an injunction against the infringement of the copyright of a book originally published by plaintiff's testator under the title of "The Autocrat of the Breakfast Table."

The case was tried upon an agreed statement of facts, the material portions of which are as follows:

Dr. Holmes, the testator, was the author of "The Autocrat of the Breakfast Table," which, during the years 1857 and 1858, was published by Phillips, Sampson & Co., of Boston, in 12 successive numbers of the Atlantic Monthly, a periodical magazine published by them, and having a large circulation. Each of these 12 numbers was a bound volume of 128 pages, consisting of a part of "The Autocrat of the Breakfast Table," and of other literary compositions. These 12 parts were pub-

lished under an agreement between Dr. Holmes and the firm of Phillips, Sampson & Co., whereby the author granted them the privilege of publishing the same, the firm stipulating that they should have no other right in or to said book. No copyright was secured, either by the author or by the firm or by any other person, in any of the 12 numbers so published in the Atlantic Monthly; but on November 2, 1858, after the publication of the last of the 12 numbers, Dr. Holmes deposited a printed copy of the title of the book in the clerk's office of the district court of the district of Massachusetts, wherein the author resided, which copy the clerk recorded. The book was published by Phillips, Sampson & Co. in a separate volume on November 22, 1858, and upon the same day a copy of the same was delivered to the clerk of the district court. The usual notice, namely, "Entered according to act of congress, 1858, by Oliver Wendell Holmes, in the clerk's office of the district court of the district of Massachusetts," was printed in every copy of every edition of the work subsequently published, with a slight variation in the edition published in June, 1874.

On July 12, 1886, Dr. Holmes recorded the title a second time, sent a printed copy of the title to the librarian of congress, who recorded the same in a book kept for that purpose, and also caused a copy of this record to be published in the Boston Weekly Advertiser; and in the several copies of every edition subsequently published was the following notice: "Copyright, 1886, by Oliver Wendell Holmes."

Since November 1, 1894, defendant has sold and disposed of a limited number of copies of the book entitled "The Autocrat of the Breakfast Table," all of which were copied by the defendant from the 12 numbers of the Atlantic Monthly exactly as they were originally published, and upon each copy so sold or disposed of a notice appeared that the same was taken from the said 12 numbers of the Atlantic Monthly.

The case was heard upon the pleadings and this agreed statement of facts by the circuit court for the Eastern district of New York, and the bill dismissed. 76 Fed. 757. From this decree an appeal was taken to the circuit court of appeals for the second circuit, by which the decree of the circuit court was affirmed. 51 U. S. App. 271, 25 C. C. A. 610, and 80 Fed. 514. Whereupon plaintiff took an appeal to this court.

BROWN, J., after stating the facts in the foregoing language, delivered the opinion of the court:

This case raises the question whether the serial publication of a book in a monthly magazine, prior to any steps taken towards securing a copyright, is such a publication of the same, within the meaning of the act of February 3, 1831, as to vitiate a copyright of the whole book, obtained subsequently, but prior to the publication of the book as an entirety.

The right of an author, irrespective of statute, to his own productions and to a control of their publication, seems to have been recognized by the common law, but to have been so ill defined that from an early period legislation was adopted to regulate and limit such right. The earliest recognition of this common-law right is to be found in the charter of the Stationers' Company, and certain decrees of the star chamber promulgated in 1556, 1585, 1623, and 1637, providing for licensing and regulating the manner of printing and the number of presses throughout the kingdom, and prohibiting the publication of unlicensed books. Indeed, the star chamber seems to have exercised the power of search, confiscation, and imprisonment without interruption from parliament, up to its abolition, in 1641. From this time the law seems to have been in an unsettled state —although parliament made some efforts to restrain the licentiousness of the press—until the eighth year of Queen Anne, when the first copyright act was passed, giving authors a monopoly in the publication of their works for a period of from 14 to 28 years. Notwithstanding this act, however, the chancery courts continued to hold that, by the common law and independently of legislation, there was a property of unlimited duration in printed books. This principle was affirmed so late as 1769 by the court of king's bench in the very carefully considered case of Miller v. Taylor, 4 Burrow, 2303, in which the right of the author of "Thompson's Seasons" to a monopoly of this work was asserted and sustained. But a few years thereafter the house of lords, upon an equal division of the judges, declared that the common-law right had been taken away by the statute of Anne, and that authors were limited in their monopoly by that act. Donaldson v. Becket, Id. 2408. This remains the law of England to the present day. An act similar in its provisions to the statute of Anne was enacted by congress

in 1790, and the construction put upon the latter in Donaldson v. Becket was followed by this court in Wheaton v. Peters, 8 Pet. 591. While the propriety of these decisions has been the subject of a good deal of controversy among legal writers, it seems now to be considered the settled law of this country and England that the right of an author to a monopoly of his publications is measured and determined by the copyright act,—in other words, that, while a right did exist by common law, it has been superseded by statute.

The right thus secured by the copyright act is not a right to the use of certain words, because they are the common property of the human race, and are as little susceptible of private appropriation as air or sunlight; nor is it the right to ideas alone, since in the absence of means of communicating them they are of value to no one but the author. But the right is to that arrangement of words which the author has selected to express his ideas, or, as Lord Mansfield describes it, "an incorporeal right to print a set of intellectual ideas or modes of thinking, communicated in a set of words or sentences and modes of expression. It is equally detached from the manuscript or any other physical existence whatsoever." 4 Burrow, 2396. The nature of this property is perhaps best defined by Mr. Justice Erle in Jefferys v. Boosey, 4 H. L. Cas. 815, 867: "The subject of property is the order of words in the author's composition, not the words themselves, they being analogous to the elements of matter which are not appropriated unless combined, nor the ideas expressed by those words, they existing in the mind alone, which is not capable of appropriation."

The right of an author to control the publication of his works at the time the title to the "Autocrat" was deposited was governed by the act of February 3, 1831 (4 Stat. 436), wherein it is enacted:

"Section 1. That from and after the passing of this act, any person or persons, being a citizen or citizens of the United States, or resident therein, who shall be the author or authors of a book or books, map, chart or musical composition, which may be now made or composed, and not printed and published, or shall hereafter be made or composed, * * * shall have the sole right and liberty of printing, reprinting, publishing and vending such book or books, * * * in whole or in part, for

the term of twenty-eight years from the time of recording the title thereof, in the manner hereinafter directed."

"Sec. 4. That no person shall be entitled to the benefit of this act, unless he shall, before publication, deposit a printed copy of the title of such book or books * * * in the clerk's office of the district court of the district wherein the author or proprietor shall reside, etc. And the author and proprietor of any such book * * * shall, within three months from the publication of said book, * * * deliver or cause to be delivered a copy of the same to the clerk of said district."

The substance of these enactments is that by section 1 the author is only entitled to a copyright of books not printed and published, and by section 4 that, as a preliminary to the recording of a copyright, he must, before publication, deposit a printed copy of the title of such book, etc.

The argument of the plaintiff in this connection is that the publication of the different chapters of the book in the Atlantic Monthly was not a publication of the copyright book, which was the subject of the statutory privilege; that if Dr. Holmes had copyrighted and published the 12 parts, one after the other, as they were published in the magazine, or separately, there would still have remained to him an inchoate right, having relation to the book as a whole; that his copyright did not cover and include the publication of the 12 parts printed as they were printed in the Atlantic Monthly; and that, while the defendant had a right to make copies of those parts and to sell them separately or collectively, he had no right to combine them into a single volume, since that is the real subject of the copyright. Counsel further insisted that, if the author had deposited the 12 parts of the book, one after the other, as they were composed, he would not have acquired the statutory privilege to which he seeks to give effect; that to secure such copyright it was essential to do three things: (1) Deposit the title, "The Autocrat of the Breakfast Table"; (2) deposit a copy of the book, "The Autocrat of the Breakfast Table"; and (3) comply with the provisions concerning notice; that he could acquire the privilege of copyright only by depositing a copy of the very book for which he was seeking protection; that if the taking of a copyright for each chapter created a privilege which was less than the privilege which would have been acquired by withholding the manu-

script until the book was completed, and then taking the copyright, this copyright is valid. His position, briefly, is that no one of the 12 copyrights, if each chapter were copyrighted, nor all of them combined, could be held to be a copyright, in the sense of the statute, of the book, which is the subject of the copyright in question; and that neither separately nor collectively could they constitute the particular privilege, which is the subject of the copyright of "The Autocrat of the Breakfast Table," as a whole.

We find it unnecessary to determine whether the requirement of section 4 could have been met by a deposit of the book, "The Autocrat of the Breakfast Table," prior to the publication of the first part in the Atlantic Monthly, or whether, for the complete protection of the author, it would be necessary that each part should be separately copyrighted. This would depend largely upon the question whether the three months from the publication, within which the author must deposit a copy of the book with the clerk, would run from the publication of the first or the last number in the Atlantic Monthly.

That there was a publication of the contents of the book in question, and of the entire contents, is beyond dispute. It follows from this that defendant might have republished in another magazine these same numbers as they originally appeared in the Atlantic Monthly. He might also, before the copyright was obtained, have published them together, paged them continuously, and bound them in a volume. Indeed, the learned counsel for the plaintiff admits that the defendant had the right to make copies of these several parts, and to sell them separately or collectively, but insists that he had no right to combine them in a single volume. The distinction between publishing these parts collectively and publishing them in a single volume appears to be somewhat shadowy; but, assuming that he had no such right, it must be because the copyright protected the author, not against the republishing of his intellectual production or "the order of his words," but against the assembling of such production in a single volume. The argument leads to the conclusion that the whole is greater than the sum of all the parts,—a principle inadmissible in logic as well as in mathematics. If the several parts had been once dedicated to the public, and the monopoly of the author thus abandoned, we do not see how it

could be reclaimed by collecting such parts together in the form of a book, unless we are to assume that the copyright act covers the process of aggregation as well as that of intellectual production. The contrary is the fact.

If the patent law furnishes any analogy in this particular,—and we see no reason why it may not,—then there is nothing better settled than that a mere aggregation of familiar elements, producing no new result, is not a patentable combination. Halles v. Van Wormer, 20 Wall. 353; Reckendorfer v. Faber, 92 U. S. 347; Pickering v. McCullough, 104 U. S. 310; Richards v. Elevator Co., 158 U. S. 299, 15 Sup. Ct. 831. But, if there were anything more than mechanical skill involved in the collocation of the several parts of this work, it would be the exercise of inventive genius and the subject of a patent rather than a copyright. If an author permit his intellectual production to be published either serially or collectively, his right to a copyright is lost as effectually as the right of an inventor to a patent upon an invention which he deliberately abandons to the public, and this, too, irrespective of his actual intention not to make such abandonment. It is the intellectual production of the author which the copyright protects, and not the particular form which such production ultimately takes; and the word "book," as used in the statute, is not to be understood in its technical sense of a bound volume, but any species of publication which the author selects to embody his literary product. We are quite unable to appreciate the distinction between the publication of a book and the publication of the contents of such book, whether such contents be published piecemeal or en bloc.

If, as contended by the plaintiff, the publication of a book be a wholly different affair from the publication of the several chapters serially, then such publication of the parts might be permitted to go on indefinitely before a copyright for the book is applied for, and such copyright used to enjoin a sale of books which was perfectly lawful when the books were published. There is no fixed time within which an author must apply for a copyright, so that it be "before publication"; and, if the publication of the parts serially be not a publication of the book, a copyright might be obtained after the several parts, whether published separately or collectively, had been in general circulation for years. Surely, this cannot be within the spirit of

the act. Under the English copyright act of 1845, provision is made for the publication of works in a series of books or parts, but it has always been held that each part of a periodical is a book within the meaning of the act. Henderson v. Maxwell, 4 Ch. Div. 163; Bradbury v. Sharp [1891], Wkly. Notes, 143.

We have not overlooked the inconvenience which our conclusions will cause, if, in order to protect their articles from piracy, authors are compelled to copyright each chapter or installment as it may appear in a periodical; nor the danger and annoyance it may occasion to the librarian of congress, with whom copyrighted articles are deposited, if he is compelled to receive such articles as they are published in newspapers and magazines; but these are evils which can be easily remedied by an amendment of the law.

The infringement in this case consisted in selling copies of the several parts of "The Autocrat of the Breakfast Table" as they were published in the Atlantic Monthly, and each copy so sold was continuously paged so as to form a single volume. Upon its title page appeared a notice that it was taken from the Atlantic Monthly. There can be no doubt that the defendant had the right to publish the numbers separately as they originally appeared in the Atlantic Monthly (since those numbers were never copyrighted), even if they were paged continuously. When reduced to its last analysis, then, the infringement consists in binding them together in a single volume. For the reasons above stated, this act is not the legitimate subject of a copyright.

The decree of the court below must therefore be affirmed.

CHAPTER VII.

TITLE BY ACCESSION.

Test of Relative Values.

EATON v. LANGLEY.

65 Ark. 448, 47 S. W. 123. 1898.

Action by P. A. Eaton against H. G. Langley. From a judgment for less than asked, plaintiff appeals. Reversed.

Block & Sullivan, for appellant. Luna & Johnson, for appellee.

BATTLE, J. P. A. Eaton alleged in his complaint that he was the owner of 5,000 cross-ties, of the value of $750, that they were in the possession of H. G. Langley, and that he was entitled to the immediate possession of the same, and asked for the possession thereof, or, if that could not be obtained, their value.

After filing with the clerk of the circuit court the affidavit required in such cases, he sued out an order for the delivery of the cross-ties to himself; also, a summons for Langley. He caused the summons to be served upon the defendant, but directed the sheriff to return the order of delivery without service, which was done.

The defendant answered the complaint by denying the allegations therein, and alleging that he was the owner of the ties.

The issues in the action were tried by the judge and jury. Upon the evidence adduced, the jury found a special verdict, and the judge filed his conclusions of fact, both of which are stated by the judge, as follows:

"From the evidence in this case the court finds as follows:

"First. That the ties in controversy were cut by the defendant from the E. ½ of section 35, township 17 N., range 3 E.

"Second. That the plaintiff was the owner of said land, and the timber thereon, at the times the ties in controversy were cut.

"Third. That said ties were cut without authority from the

plaintiff or any one representing him, and that in so cutting the said timber the defendant was a trespasser.

"Fourth. That the defendant in cutting said timber was acting under a bona fide belief that he was the owner of the said timber and had a right to cut it, and that he was an innocent, and not a willful trespasser therein.

"And from the answers of the jury to the special interrogatories the court finds:

"Fifth. That at the time this action was begun the defendant had 3,500 cross-ties, which he had made from said land while the plaintiff was the owner thereof, under the foregoing circumstances.

"Sixth. That said ties at the beginning of this action were of the value of 12½ cents each.

"Seventh. That the timber from which the same were made, while standing, was of the value of 2 cents per tie."

Upon these findings of facts the court rendered a judgment as follows:

"It is therefore ordered, considered, and adjudged by the court that the plaintiff have and recover of and from the defendant the sum of seventy dollars, and all costs of this cause, and that, further, in case the sums of money above mentioned, together with the said costs, are not paid within ten days from this date, the plaintiff shall have and recover of the defendant the possession of the 3,500 cross-ties situated on the east half of section thirty-five in township seventeen north, range three east, and for which writ of delivery in this case may issue."

After filing a motion for a new trial, which was overruled, and a bill of exceptions, the plaintiff appealed.

In an attempt to sustain the judgment of the circuit court, appellee insists that this is not an action of replevin or detinue, "but is in the nature of an action of trover or trespass under the common law." But the name of it is immaterial. The Code abolished all forms of action. Let its name be what it may, it is unquestionably an action to recover the possession of specific personal property. In such actions the statute provides that the "judgment for the plaintiff may be for the delivery of the property, or for the value thereof, in case a delivery cannot be had, and damages for the detention." Sand. & H. Dig. § 6398. The right to this judgment is in no wise

affected by the issue or failure to issue an order of delivery, which is only necessary to enable the plaintiff, upon the execution of the proper bond, to obtain the immediate possession of the property at the beginning or during the progress of the suit, or force the defendant to give bond for its retention, and for no other purpose. Id. § 6383 et seq.

The cross-ties in controversy are the product of the timber of appellant, and of the labor of the appellee. The latter, honestly believing that he was the owner of the timber, converted it into the cross-ties. The material used in making each tie, as it was in the tree, was worth 2 cents, and, as it is, is worth 12½ cents. Under these circumstances, is appellant the owner of the ties, and entitled to their possession?

As a general rule, an owner cannot be deprived of his property without his consent, or operation of law. If unauthorized persons have bestowed expense or labor upon it, that fact cannot constitute a bar to his reclaiming it, so long as identification is not impracticable. But there must be a limit to this right. Mr. Justice Blackstone lays down the rule, very broadly, that if a thing is changed into a different species, as by making wine out of another's grapes, oil from his olives, or bread from his wheat, the product belongs to the new operator, who is only to make satisfaction to the former proprietor for the materials converted. 2 Bl. Comm. 404. Many authorities have followed this rule, while others have held that, in the case of a willful appropriation, no extent of conversion can give to the willful trespasser a title to the property, so long as the original materials can be traced in the improved article. Wetherbee v. Green, 22 Mich. 311.

In McKinnis v. Railway, 44 Ark. 210, and Stotts v. Brookfield, 55 Ark. 307, 18 S. W. 179, it was held that the owner of timber which had been taken and converted by a willful trespasser into cross-ties may recover the ties, or their value, in an action of replevin against the trespasser. In the latter case the court said: "While it is difficult to draw from the authorities a rule by which we may determine with certainty what change in the original property converted will destroy its identity so that replevin will not lie for its recovery, it is settled that the conversion of timber into cross-ties is not such a change, whether the change has been wrought by a willful or an innocent wrong-

doer." But there was no occasion for saying what was said as to innocent wrongdoers. In that case the defendant entered upon the land of plaintiff, and, without his authority or consent, knowing at the time his claim of ownership of the same, cut timber therefrom, and converted it into the cross-ties in controversy. Upon that fact the judgment of the court was based. In neither of these cases was any rule laid down by which the identity of the property can be ascertained.

The authorities generally agree in holding that when a party has taken the property of another in good faith, and, in reliance upon a supposed right, without intention to commit wrong, converted it into another form, and increased its value by the expenditure of money and labor, the owner is precluded from following and reclaiming the property in its new form if the transformation it has undergone has converted it into an article substantially different. But they have not agreed upon any rule by which it can in all cases be ascertained whether this transformation has or has not taken place. "If grain be taken and made into malt, or money taken and made into a cup, or timber taken and made into a house, it is held in the old English law that the property is so altered as to change the title. * * * But cloth made into garments, leather into shoes, trees hewed or sawed into timber, and iron made into bars, it is said, may be reclaimed by their owner in this new and original shape. * * * Some of the cases place the right of the former owner to take the thing in its altered condition upon the question whether its identity could be made out by the senses." Wetherbee v. Green, 22 Mich. 318, 319.

But the supreme court of Michigan (Mr. Justice Cooley delivering the opinion of the court) said that the test of the senses is unsatisfactory, and that "no test which satisfies the reason of the law can be applied in the adjustment of questions of title to chattels by accession, unless it keeps in view the circumstances of relative values." It said: "It may often happen that no difficulty will be experienced in determining the identity of a piece of timber which has been taken and built into a house, but no one disputes that the right of the original owner is gone in such a case. A particular piece of wood might perhaps be traced, without trouble, into a church organ, or other equally valuable article; but no one would defend a rule of law which,

because the identity could be determined by the senses, would permit the owner of the wood to appropriate a musical instrument, a hundred or a thousand times the value of his original materials, when the party who, under like circumstances, has doubled the value of another man's corn by converting it into malt is permitted to retain it, and held liable for the original value only. Such distinctions in the law would be without reason, and could not be tolerated. When the right to the improved article is the point in issue, the question how much the property or labor of each has contributed to make it what it is, must always be one of first importance. The owner of a beam built into the house of another loses his property in it, because the beam is insignificant in value or importance as compared to that to which it has become attached; and the musical instrument belongs to the maker, rather than to the men whose timber was used in making it, not because the timber cannot be identified, but because in bringing it to its present condition the value of the labor has swallowed up, and rendered insignificant, the value of the original materials. The labor in the case of the musical instrument is just as much the principal thing as the house is in the other case instanced. The timber appropriated is in each case comparatively unimportant." Wetherbee v. Green, 22 Mich. 319, 320.

Wetherbee v. Green, 22 Mich. 311, was an action of replevin by the appellee against the appellant to recover a quantity of hoops made out of the timber of the former by the latter, in good faith, under what he supposed to be good authority. The timber in the trees was worth only $25, and the hoops made out of it were worth $700. The court held that the owner could not recover the hoops, but was entitled to the damages sustained by reason of the unintentional trespass. This decision was based upon the reason that the hoops were made in good faith, and upon the fact that the value of the timber, as compared with the value of the labor expended in making them, was insignificant.

In Mining Co. v. Hertin, 37 Mich. 332, the parties were owners of adjoining tracts of timbered land. In the winter of 1873-74 the Hertins, in consequence of a mistake respecting the boundaries, went upon the lands of the mining company, and cut a quantity of cord wood, which they hauled and piled on the bank of Portage Lake. The next spring the mining com-

pany took possession of the wood, and converted it to their own purposes. The wood on the bank of the lake was worth $2.87½ per cord, and the value of the labor expended by the Hertins in cutting and putting it there was $1.87½ per cord,—nearly doubling the value of the timber. After the mining company had taken possession of the wood, the Hertins brought an action against the mining company for the value of their labor expended in converting the timber into cord wood, and placing it upon the bank of the lake. The court held that they were not entitled to recover. Chief Justice Cooley (the same judge who delivered the opinion in Wetherbee v. Green, supra), in delivering the opinion of the court, said: "It is on all hands conceded that where the appropriation of the property of another was accidental, or through mistake of fact, and labor has in good faith been expended upon it, which destroys its identity, or converts it into something substantially different, and the value of the original article is insignificant, as compared with the new product, the title to the property in its converted form must be held to pass to the person by whose labor, in good faith, the change has been wrought; the original owner being permitted, as his remedy, to recover the value of the article as it was before the conversion. This is a thoroughly equitable doctrine, and its aim is to so adjust the rights of the parties as to save both, if possible, or as nearly as possible, from loss. But, where the identity of the original article is susceptible of being traced, the idea of a change in the property is never admitted, unless the value of that which has been expended upon it is sufficiently great, as compared with the original value, to render the injustice of permitting its appropriation by the original owners so gross and palpable as to be apparent at the first blush. Perhaps no case has gone further than Wetherbee v. Green, 22 Mich. 311, in which it was held that one who, by unintentional trespass, had taken from the land of another young trees of the value of $25, and converted them into hoops worth $700, had thereby made them his own, though the identity of trees and hoops was perfectly capable of being traced and established.

"But there is no such disparity in value between the standing trees and the cord wood in this case as was found to exist between the trees and the hoops in Wetherbee v. Green. The trees were not only susceptible of being traced and identified in

the wood, but the difference in value between the two is not so great but that it is conceivable the owner may have preferred the trees standing to the wood cut. The cord wood has a higher market value, but the owner may have chosen not to cut it, expecting to make some other use of the trees than for fuel, or anticipating a considerable rise in value if they were allowed to grow. It cannot be assumed, as a rule, that a man prefers his trees cut into cord wood, rather than left standing; and if his right to leave them uncut is interfered with, even by mistake, it is manifestly just that the consequences should fall upon the person committing the mistake, and not upon him. Nothing could more encourage carelessness than the acceptance of the principle that one who by mistake performs labor upon the property of another should lose nothing by his error, but should have a claim upon the owner for remuneration. Why should one be vigilant and careful of the rights of others, if such were the law? Whether mistaken or not is all the same to him, for in either case he has employment, and receives his remuneration, while the inconveniences, if any, are left to rest with the innocent owner. Such a doctrine offers a premium to heedlessness and blunders, and a temptation by false evidence to give an intentional trespass the appearance of an innocent mistake." See Grant v. Smith, 26 Mich. 201; Gates v. Boom Co., 70 Mich. 309, 38 N. W. 245.

Judge Cooley, in his work on Torts, lays down the rule upon this subject in the same words it is stated in Mining Co. v. Hertin, supra. Cooley, Torts (2d Ed.), pp. 59, 60.

Prof. Schouler, in his work on Personal Property, sums up the modern doctrine upon this subject as follows: "Where the trespass was not willful, but accidental, as through some mistake of fact, and the materials taken can still be identified, and the labor and materials of the trespasser are not shown to have gone further than the appropriated materials towards producing the present valuable chattel, the owner of the materials is still entitled to the chattel. But where no element of willfulness or intentional wrong whatever appears on the part of him who applied another's materials, and the identity of those materials has finally disappeared in the new product, or where it can be shown that his own labor and materials contributed essentially much more to the value of the present chattel than those

materials which he took without intending a wrong, he shall keep the chattel as his own; making, however, due compensation to the owner of the materials for what he took." 2 Schouler, Pers. Prop. (2d Ed.) § 37.

On account of the conflict of opinion upon this subject, and the fact that this court is free from the restraints of precedents in respect thereto, we are at liberty to select the rule which is sustained by authority, and is in our opinion the wisest and most just. The rule stated by Judge Cooley comes nearer approaching this standard. The increased value of the original materials furnishes no guide by which the merit of the laborer who has given them their new form can be determined. The increased value is the joint result of the original material, and the work and materials expended by the laborer in creating the new form. They may be equal, or the former may exceed the latter in value; and the increased value may exceed the aggregate value of the original materials and that expended upon them. Independent causes may contribute to the increased value. For instance, transportation to a market where the original material is scarce and in great demand may greatly increase its market value, or may diminish such value by the transfer to the place where the supply is greater and the demand is less than it is in the market from which it was shipped. So it cannot be said that the transportation added the increased value. Other causes—supply and demand—affected the value. So may labor change the original material into a new form, and increase the demand for it in that shape, and thereby enhance its value. Why, then, should the person who has made the expenditure be entitled to the difference between the aggregate value of his expenditure and the original material and the value of the article in its new form? He can lose no more than the value of his labor or other expenditure. His right to the property in its new form should not, therefore, in any case, be dependent upon its increased value, but upon the relative values of the original materials and his expenditures upon the same; and this should be considered only when the identity of the original article is susceptible of being traced, and then only when he has acted in good faith, and converted it into something substantially different, and the value of the original article, as compared with the value of that expended upon it, is so

insignificant as "to render the injustice of permitting its appropriation by the original owner so gross and palpable as to be apparent at the first blush." In addition to the relative values, the injury inflicted upon the owner by the trespasser, and the injustice of taking from the former his property, against his will, at its market value, should be considered, and compared with the hardship the latter may suffer by the loss of his labor and other expenditures, in determining whether this appropriation would be such gross and palpable injustice as to give the innocent trespasser the right to the property in its converted form, as in Mining Co. v. Hertin, 37 Mich. 332. In this manner the rights of parties would be more nearly protected, and justice at the same time administered.

The value of the cross-ties in controversy was 12½ cents a tie. The value of each in the tree was two cents. The value of the labor expended upon them is not shown, but, assuming it to be the increased value of 10½ cents a tie, the difference between it and the value of the original material is not so great as to make the value of the latter, as compared with that of the former, insignificant, and to make the appropriation of the cross-ties by the original owner to his own use, without compensation, appear, under the circumstances, gross injustice, at the first blush. The disparity is not so great as it was in Wetherbee v. Green, supra, in which trees of the value of $25 were cut and taken by one from the land of another, and converted into hoops of the value of $700, which was 28 times the value of the trees, while the cross-ties in this case were about six times; and yet the supreme court of Michigan, in Mining Co. v. Hertin, supra, said that "perhaps no case has gone further than Wetherbee v. Green."

In considering the justice of permitting the appellant to appropriate the cross-ties to his own use, the invasion of his rights and the injury done to him by appellee should not be overlooked. The trees belonged to him. They were standing upon his land, and he had the right to hold them as they were. No one had the right to take them from him, convert them into ties, and force him to accept their value at the time of the conversion. He may have preferred to have them stand, and, if left standing for a few years, they might yield him a great profit; and the enhancement of their value by the labor of

appellee might be a poor compensation for the wrong done. But, whether he wished to sell or not, it would be gross injustice to permit appellee to force him to sell. He is entitled to the protection of the laws. Deny to him the right to the cross-ties, and force him to accept the value of his timber when appropriated by a trespasser, as it was at the time of the conversion, and he has no adequate protection. The injury inflicted by the trespasser would be borne in part by the innocent owner, and the guilty would escape. "Such a doctrine," as said by Chief Justice Cooley, "offers a premium to heedlessness and blunders, and a temptation by false evidence to give an intentional trespasser the appearance of an innocent mistake."

Assuming the trees to be the property of appellant, and taking into consideration the great wrong committed by appellee in cutting them; the deprivation of the appellant of the right to use the same as it might please him; the probable loss occasioned thereby; the fact that the identification of the original material was unaffected by the labor expended; the encouragement that would be afforded to trespassers by allowing them to enjoy the fruits of their labor upon a mere showing of mistake; the protection a contrary policy would afford to the owner of standing trees against heedlessness, carelessness, pretended mistakes, and trespasses; and the importance of pursuing such course to secure such protection,—and comparing the injury inflicted upon the appellant by the appellee, and the injustice of taking from the former his property against his will, with the hardship the latter may suffer by the loss of his labor, we think it would be lawful and right to allow appellant to recover the cross-ties, and to impose upon the appellee the consequences of his own carelessness.

But appellant has not obtained possession of the cross-ties. In the event he cannot do so, he is entitled to the value of the property he has lost. How is this value to be estimated? This question is not beset with the difficulties which attend the right of recaption. When the appellant sued for the possession of the cross-ties, he was entitled to their possession, unless he had lost his property by the wrongful act of another. If entitled to retake it in its new form, it must be taken as he found it, though enhanced in value by the labor of appellee. The ties cannot be restored to their original form. The appellee cannot force the

appellant to become a debtor to him for the value of his labor, or demand compensation for his voluntary additions to the value of the trees converted into ties, without the assent of the appellant. He cannot impose any conditions upon the right to retake them. The question therefore being whether the appellee shall lose his labor, or the appellant lose the right to take his property, the law decides in favor of the latter. But in determining the compensation the appellant shall receive as the value of his property which has been wrongfully converted this difficulty does not arise. The value of the property of the owner, which has been converted, can be ascertained and fixed without including therein the labor expended upon it. Hence the law protects the unintentional trespasser in such cases by limiting the right of the owner to recover. Lumber Co. v. Lesh, 119 Ind. 98, 20 N. E. 291; Heard v. James, 49 Miss. 236; Herdic v. Young, 55 Pa. St. 176; Single v. Schneider, 30 Wis. 570; 2 Sedg. Meas. Dam. (8th Ed.) § 534; Mining Co. v. Hertin, 26 Am. Rep. 525, 530. As to the extent of this limitation the authorities are not agreed. But we think that inasmuch as this is an exception to the general rule, made for the purpose of protecting the unintentional trespasser, it should be allowed to prevail only to the extent it is necessary to give protection, and that the owner, in actions for the possession of personal property in the new form into which it has been converted inadvertently, under a bona fide but mistaken belief of right, "in case a delivery cannot be had," is entitled to recover the value of the property in its new form, less the labor and material expended in transforming it, provided the expenditures do not exceed the increase in value which was added to the transformation, in which event he should recover the value of the property in its new form, less the increase. Weymouth v. Railway Co., 17 Wis. 550. Some courts hold that the owner, in such cases, should recover the value of his property in its new form, less the expense incurred in converting it into such form and increasing its value. Goller v. Fett, 30 Cal. 482; Naye v. Yappen, 23 Cal. 306; Herdic v. Young, 55 Pa. St. 176. But we do not think this is a correct rule in all cases, for the expense may in some cases exceed the increase in value, and in that event the rule would require the owner to pay for something that he never received.

According to this opinion, two errors appear in the record in

this action. One is in the form of the judgment. If the appellant was the owner of the property in controversy, he was entitled to a judgment for its possession, and for its value, according to the rule before stated, "in case a delivery cannot be had." Sand. & H. Dig. § 6398. On the contrary, the judgment rendered is for the value of the property determined by the court, and then for its possession in the event the value is not paid. The other error is the failure to fix the value according to the rule we have stated.

For these errors the judgment of the circuit court is reversed, and the cause is remanded for a new trial.

BUNN, C. J. (dissenting).

CHAPTER VIII.

TITLE BY CONFUSION.

Nature of Confusion.

MEYERS v. GERHART ET AL.

54 Wash. 657, 103 Pac. 1114. 1909.

Department 2. Appeal from Superior Court, Stevens County; D. C. Carey, Judge.

Action by J. A. Meyers against W. H. Gerhart and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Slater & Allen, for appellant. Danson & Williams and Jesseph & Grinstead, for respondents.

PARKER, J. This is an action of replevin. By his complaint plaintiff alleges, in substance, that on September 12, 1907, and for a long time prior, he was and still is the owner and entitled to the possession of 149,764 feet, board measure, of lumber, and 44,800 lath, of the total value of $3,395.61, which was then and at the commencement of the action in the possession of defendants at the sawmill heretofore known as the Meyers Falls Lumber Company Sawmill, near the town of Meyers Falls, in Stevens County; that on or about September 13, 1907, he demanded possession of said lumber and lath from the defendants, which they refused and still refuse to deliver to him, and they wrongfully detain the same, to his damage in the sum of $100. Judgment is prayed for in the usual form, in the alternative, and also for $100 damages for the wrongful detention. The answer of defendants is, in substance, a denial of the material allegations of the complaint. The action was commenced on October 31, 1907, at which time the plaintiff by delivering to the sheriff affidavit and bond in usual form caused the sheriff to take into his possession from the possession of defendants lumber and lath approximately of the quantity claimed in his complaint, which was thereafter returned to defendants by the

sheriff upon redelivery bond being furnished by them. The cause proceeded to trial before the court and a jury. At the conclusion of the plaintiff's evidence, and also at the conclusion of all the evidence, defendants' counsel challenged the sufficiency of the evidence to entitle plaintiff to recover, and moved the court to withdraw the case from the jury and render judgment for defendants, which motion was denied; the court at the same time expressing doubts as to plaintiff having pursued the proper remedy. The jury returned a verdict in favor of plaintiff, finding he was entitled to 149,381 feet of lumber and 44,800 lath, finding the total value thereof to be $2,629.77, and that plaintiff was damaged $100. Thereafter defendants by their attorneys moved the court to set aside the verdict and render judgment in their favor notwithstanding the verdict, which the court granted, and rendered judgment accordingly, from which the plaintiff has appealed.

The facts which are necessary for our consideration are either admitted or conclusively proven, and may be summarized as follows: Appellant bases his right to recover upon the alleged wrongful taking from his land by the Meyers Falls Lumber Company and by respondents of saw logs which he claims have been converted into lumber and lath in the quantity alleged in his complaint, though it is not claimed that the lumber and lath manufactured from appellant's logs can be identified, nor that the lumber and lath taken by the sheriff was produced from his logs. During the summer and fall of 1906 the Meyers Falls Lumber Company was engaged in logging from the land of L. W. Meyers, the father of appellant, from whom it had purchased the standing timber thereon. Appellant is the owner of land adjoining and immediately to the north with standing timber thereon. While cutting and removing the timber so purchased from L. W. Meyers, the employes of the Meyers Falls Lumber Company went over the line and cut trees into logs upon the land of appellant, and removed practically all of them with logs taken from the land of L. W. Meyers to the sawmill, where they became so intermingled as to entirely lose their identity. The sawmill was running in the fall, up until November 5th, when it stopped for the year. A considerable portion of the logs, irrespective of where they came from, had then been sawed into lumber, and some of the lumber had been

shipped out to market before December 8, 1906, on which date the Meyers Falls Lumber Company sold out to the respondents, conveying to them all the remaining lumber and loose logs. One Gray had been foreman for the Meyers Falls Lumber Company, and whatever knowledge it had of the cutting of logs upon the land of appellant was only such as would be imputed to it by reason of such agency. After the sale to respondents, Gray continued for a time to act as foreman for respondents, and, in removing the remainder of the logs to the mill from the land of L. W. Meyers, caused to be removed to the mill a few remaining logs from appellant's land which had been cut before the sale. It is not claimed that any trees upon appellant's land were cut down after the sale. The identity of these few logs thus became lost as the others had. This occurred during December immediately following the sale. Neither of the respondents had any knowledge of any of the logs having come from appellant's land until after their identity had become entirely lost; the first information received by them being by a letter from appellant, dated January 18, 1907, wherein he claimed that the logs had been taken from his land by the Meyers Falls Lumber Company, and that the same were then in the log ricks or lumber yards of respondents as successors of that company, and notifying them that he would claim the product from his timber in whichever form it might be. No demand was made in the letter for any logs or lumber. In April, 1907, appellant says he ascertained the amount of the logs taken from his land by measurement from the stumps and tops of the trees left on the ground, and that he found the quantity of logs taken was such that lumber and lath of the quantity alleged in his complaint could be manufactured therefrom. About April 1, 1907, the mill again started sawing the logs into lumber. On June 15, 1907, appellant notified respondents by letter of the amount of the lumber and lath he had ascertained the logs taken from his land would make, and claimed the same was worth $3,398.33. No demand was made for lumber or lath, though this letter might be construed as a demand for the value, as he states therein: "I shall expect a settlement of this account soon." At that time, according to his own statement, all the logs from his land had been sawed into lumber. Appellant never made demand for any logs, but on September 12, 1907, made his first demand for the lumber and

lath he seeks to recover by this action. Thereafter, on October 31st, this suit was commenced and seizure made by the sheriff. Just what proportion the logs from appellant's land bore to the whole quantity of logs they were commingled with is not very certain, but appellant estimates the whole at 2,000,000 feet or more; so, according to his own figures, the quantity from his land was a comparatively small part of the whole. We have no evidence in the record as to the kind of lumber the logs from appellant's land were sawed into, other than his own statement, or rather opinion.

The principal contention of learned counsel for appellant, as we understand them, is that the original taking of the logs from appellant's land, mingling them with other logs, and manufacturing them into lumber was willful and with full knowledge of the invasion of his rights, and therefore the fact that his timber was thus changed in form and the value thereof increased did not change the title to the property, so as to destroy his right to recover possession thereof; and, even though the identity of the property is lost, he has the right to recover property of the kind and quantity into which it was converted, though it may be physically other property, in whole or part. We will not enter into the question of the knowledge and willful invasion of appellant's rights by the Meyers Falls Lumber Company, but for the sake of argument only assume that it did invade appellant's rights with full knowledge thereof as he claims; for he is not in this action seeking to recover anything from the Meyers Falls Lumber Company, but from these respondents as their successors in interest. We think so far as the rights of respondents are to be measured by the innocent or willful acts which involved them in this controversy it is their own knowledge and their own acts which are to be considered. If we were dealing with the question, as if appellant was seeking to recover from the Meyers Falls Lumber Company, conceding it willfully committed the trespass, and the identity of the property was not lost, or that it went into a common mass all of which was of the same in kind and quality, and still in its possession at the commencement of the action, the matter would be comparatively easy of solution in appellant's favor, under the general rule that "title to chattels is not changed by bestowal of labor or skill upon them, by a willful wrongdoer, in manufacturing them or

changing them into a commodity of another kind. No matter how great the transformation may be, the true owner may follow and reclaim his materials as far as he can prove their identity," as stated in the syllabus to Silsbury v. McCoon, 3 N. Y. 379, 53 Am. Dec. 307, which is cited and quoted at length in Cobbey on Replevin (2d Ed.) § 909, as the leading case in this country on the subject. In that case the court, referring to the agreement of the common law with the civil law in certain respects, says further: "They agree in another respect, to wit, that if the chattel wrongfully taken afterwards come into the hands of an innocent holder, who, believing himself to be the owner, converts the chattel into a thing of different species, so that its identity is destroyed, the original owner cannot reclaim it. Such a change is said to be wrought when wheat is made into bread, olives into oil, or grapes into wine. In a case of this kind the change in the species of the chattel is not an intentional wrong to the original owner. It is therefore regarded as a destruction or consumption of the original materials, and the true owner is not permitted to trace their identity into the manufactured article for the purpose of appropriating to his own use the labor and skill of the innocent occupant who wrought the change; but he is put to his action for damages as for a thing consumed." Cobbey on Replevin (2d Ed.) § 396; Wells on Replevin (2d Ed.) § 216; Schouler's Personal Property (3d Ed.) § 49.

This leads us to inquire concerning respondents' knowledge and good faith in acquiring the logs and sawing them into lumber and lath. We have seen that they had no knowledge whatever of any claim of appellant until January 18, 1907, some considerable time after the purchase of the logs and lumber from the Meyers Falls Lumber Company and the loss of the identity of all the logs by being commingled with a much larger mass of others, and the sawing of a considerable portion thereof into lumber. Counsel for appellant argue that the knowledge of Gray and his removal of the few remaining logs already cut from the land of appellant to respondents' log ricks soon after the sale while he was in their employ must be imputed to respondents, and their good faith and honesty of purpose judged as though they actually knew these few logs were thus taken from appellant's land. The knowledge of Gray

as to any of these logs coming from the land of appellant was acquired by him long before his employment by respondents, and was not communicated to them, nor did they have any knowledge which would put them upon inquiry, or would raise the slightest suspicion that their employe was trespassing upon appellant's land. We think under these circumstances the rule that knowledge which an agent has acquired in business other than that of his principal cannot be imputed to the principal should apply here. Texas Loan Agency v. Taylor, 88 Tex. 47, 29 S. W. 1057; Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772; Wheeler v. McGuire, 86 Ala. 398, 5 South. 190, 2 L. R. A. 808; Pepper & Co. v. George, 51 Ala. 190; Pac. Mfg. Co. v. Brown, 8 Wash. 347, 36 Pac. 273. It is apparent from the authorities that the good faith and honesty of purpose with which the one acquiring the property and working the change therein has acted is the controlling influence in determining his title to the property in its changed form. We do not think one's good faith should be tested by any technical rule of imputed or constructive knowledge when he has no actual knowledge and no knowledge which would put a reasonably prudent man on inquiry. A man's motives cannot be affected by a fact he has no actual knowledge of or no knowledge which would suggest inquiry relative thereto. We think the facts of this case show beyond controversy that respondents had no knowledge of any kind of the claim of appellant until long after the identity of all the logs had become lost.

So far, we have considered the question of respondents' good faith, touching their acquiring of the logs and lumber, up until the 18th day of January, 1907, when appellant wrote to them that his logs had been taken by the Meyers Falls Lumber Company, and that they were in some form among respondents' logs or lumber, but without any demand therefor. At this time, we are to remember, the identity of the logs had become entirely lost without any fault of respondents, a large part of the total mass, probably half or more, had been sawed into lumber, and a considerable part of that lumber shipped out to market; and it was impossible to tell what portion of the logs from appellant's land went into that lumber. Nothing further was communicated by appellant to respondents until June 15, 1907, when he notified them of the quantity of lumber and lath the

logs from his land would make as he estimated, claiming the value thereof in its manufactured form to be $3,398.33, and that, using his own words, "I shall expect a settlement of this account soon." At this time, according to his own statement, all of the timber from his land had been sawed into lumber. Indeed, he delayed making this communication as to the quantity and value to respondents, which might well be argued to be a demand for the price of the lumber, without excuse, and for the evident purpose of waiting until he was sure the entire mass of logs in which the logs from his land had lost their identity had been sawed into lumber. This is evidenced by a letter he wrote to respondents three days later, in which he is careful to inform them: "The last of the timber from my land in this claim was sawed last week." At this time it is further to be remembered that according to the testimony of Bradrick, while a witness for appellant, they had been continuously shipping the lumber every month, even after the yards had been quite well cleaned of lumber in the spring. It is quite plain from the undisputed facts, not only that the logs from appellant's land had entirely lost their identity months before, and the entire mass into which they went had about this time been sawed into lumber of different kinds and values; but that a very large part of the entire mass had been shipped out to market, and was not then in the possession of respondents. This shipping continued, which still further reduced the amount remaining in their possession, until after September 12th, three months later, when appellant made his first and only demand for the property preliminary to the bringing of this action, which was still delayed until October 31st, a month and a half later. In Cobbey on Replevin (2d Ed.) § 395, it is stated: "The tendency of the courts in applying the rule * * * has been to require of the plaintiff in such cases a reasonable diligence in asserting his rights, and where the defendant is not a willful wrongdoer, without the shadow of legal excuse, this should always be required of plaintiff." Wells on Replevin (2d Ed.) § 217. We believe appellant's delay in claiming the property, as shown by the undisputed facts, should have great weight in the determination of respondents' rights in this case.

It is not pretended that the lumber from appellant's logs can be identified, nor even that his logs could be identified before

being sawed into lumber. It is only a matter of surmise that any of the lumber claimed by appellant and caused by him to be seized was the physical product of logs from his land. The theory upon which learned counsel for appellant seem to base appellant's right to recover this lumber and lath is that they can take from the mass of lumber in respondent's yards a quantity equal to that which the logs from appellant's land would produce. We do not lose sight of the rule which enables one to recover his property from a common mass with which it has become commingled when both are the same in kind and quality, and are so homogeneous both before and after commingling as to render actual physical identification of one part of the mass from the other of no consequence, like corn, wheat, oil, etc. Such conditions apparently constitute an exception to the rule requiring actual physical identification of the property sought to be recovered by replevin, upon the theory that one part of the mass being alike in kind, quality, and value to all other parts thereof, it is of no consequence to the rights of the parties what part each takes beyond the mere question of quantity. This exception to the general rule requiring identification is recognized in the following authorities: Wells on Replevin (2d Ed.) § 203; Cobbey on Replevin (2d Ed.) §§ 401, 402; Henderson v. Lauck, 21 Pa. 359; Inglebright v. Hammond, 19 Ohio, 337, 53 Am. Dec. 430; Wilkinson, Carter & Co. v. Stewart, 85 Pa. 255; Eldred v. Oconto Co., 33 Wis. 133; Ryder v. Hathaway, 21 Pick. (Mass.) 298. The exact limits of the application of this exception are not very clearly defined, some of the cases going so far as to allow the claimant to take his proper quantity from a mass of wood or logs; but only where the kind and quality of each owner were alike. This is not a question of appellant taking a quantity of logs from a common mass. Conceding his logs were in kind and quality like the balance of the other, some 2,000,000 feet, they became commingled with, he claims to have known the quantity he was entitled to in April, 1907, at which time there were still in the ricks of respondents, not yet sawed into lumber, a large quantity of this mass of logs, aggregating several times the quantity he claimed had been taken from his land. He not only did not demand or seek to recover from this mass, but he never did demand or seek to recover any logs; but waited, seeing it was being converted into

lumber of varying kinds and values, and, after feeling sure the physical material was all so changed into more valuable form, then for the first time made a communication to respondents on June 15th, which, if it can be construed as a demand for anything, was a demand for money; the first demand for the lumber being made three months later. No authority has been called to our attention, and we think there is none, holding a claimant to have the right to take from a common mass with which his property has lost its identity without fault of the one from whom he claims, where the property has undergone such physical change as in this case, especially when he has stood by and watched the gradual conversion into something much more valuable, of varying kinds and values, without making claim or demand for his property in specie, until after such change has occurred, as this appellant has done. We think under the facts here admitted or conclusively shown, touching the conduct of both the appellant and respondents, the former cannot lawfully recover the lumber and lath claimed by him.

We think that the learned trial court correctly disposed of the case, and that its judgment should therefore be affirmed. It is so ordered.

RUDKIN, C. J., and MOUNT, CROW, and DUNBAR, JJ., concur.

CHAPTER IX.

TITLE BY GIFT.

Gift by Written Assignment.

ALLEN-WEST COMMISSION CO. v. GRUMBLES.

129 Fed. 287. 1904.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

[Plaintiff, a judgment creditor of Grumbles, seeks to reach stock which defendant had purported to assign to his wife.]

Before SANBORN, THAYER, and HOOK, Circuit Judges.

SANBORN, J., after stating the case as above, delivered the opinion of the court.

The crucial question in this case is: Did the delivery in May, 1899, by the defendant Grumbles to his wife, of the formal bill of sale of his interest in the Mann-Tankersley Drug Company business, constitute a completed gift of his 110 shares of stock in the corporation, in view of the fact that Grumbles retained the certificate of the shares, kept the stock in his own name upon the books of the company, voted and received dividends upon it until after he had become hopelessly insolvent and then transferred it to his wife by an indorsement and surrender of the certificate without the use of the assignment of 1899, of which no notice had been given to the corporation? If this question should be answered in the affirmative, the transfer by Grumbles to his wife in February, 1903, was no evidence of an intent on his part to hinder or defraud his creditors, because the stock had not been his since May, 1899. If, on the other hand, this question should be answered in the negative, that transfer was conclusively fraudulent as against creditors, because it was a voluntary conveyance, without valuable consideration, after the donor had become heavily indebted to his various creditors.

While the assignment recites a consideration of five dollars

and of love and affection, counsel for Mr. and Mrs. Grumbles do not claim, nor has the court below found, that this instrument evidences any sale for value of the 110 shares of stock, or that $5, or any other sum, was ever paid as a part of the consideration for the execution or delivery of that assignment. Moreover, if that question were presented here for our consideration, the written instrument and the facts disclosed by the findings of the court would lead our minds to the conclusion which counsel for all parties to this litigation have tacitly adopted. At the time the assignment was made the stock was worth about $3,700. It is not a rational inference that property of this value was sold for $5. Again, the entire assignment must be read and construed as a whole. When thus read, it declares that it was made for $5, for love and affection, and for the purpose of making a division of the property of the grantor. The natural inference from these recitals is that it was a voluntary assignment without valuable consideration, and that the reference to the $5 is the usual form of recital which is frequently inserted in instruments of this character, when no valuable consideration is actually paid. Baltimore Retort & Fire Brick Co. v. Mali, 65 Md. 93, 94, 3 Atl. 286, 57 Am. Rep. 304.

We come, therefore, to the only question to which counsel have addressed their argument—to the question whether or not, under the law applicable thereto, the facts of this case will sustain the conclusion that the defendant Grumbles made a valid gift of his stock in the Mann-Tankersley corporation to his wife on May 14, 1899, when he delivered to her the assignment in question. In every case of an alleged gift, the burden of proof is upon the donee to establish a complete and valid donation. Jones v. Falls (Mo. App.) 73 S. W. 903. Among the indispensable conditions of a valid gift are the intention of the donor to absolutely and irrevocably divest himself of the title, dominion, and control of the subject of the gift in præsenti at the very time he undertakes to make the gift * * * the irrevocable transfer of the present title, dominion, and control of the thing given to the donee, so that the donor can exercise no farther act of dominion or control over it * * * and the delivery by the donor to the donee of the subject of the gift or of the most effectual means of commanding the dominion of it. This delivery must be an actual one "so far

as the subject is capable of it. It must be secundum subjectam materiam, and be the true and effectual way of obtaining the command and dominion of the subject." 2 Kent's Com. 439. If the subject of the gift is a chose in action, such as a bond, a note, or stock in a corporation, the delivery of the most effectual means of reducing the chose to possession or use, such as the delivery of the bond, or the note, or the certificate of stock, if present and capable of delivery, is indispensable to the completion of the gift. * * *

Stock in a corporation is a chose in action, and the certificates are the evidence of its existence and of its amount. They bear some analogy to the title deeds of real estate, Com. v. Crompton, 137 Pa. 138, 20 Atl. 417; but they are far more commanding and useful in the handling of the stock they represent than are title deeds in the handling of the land they describe. Because the stock in a corporation is transferred by means of the delivery, or by means of the indorsement and delivery of the certificates, the latter by a sort of mental substitution come to be thought of and dealt in as the stock itself. The stock of corporations is ordinarily transferred on the books of the company only by the surrender of the certificates and the issue of new ones to the grantees. Hence assignments, bills of sale, and conveyances, without the accompanying possession and delivery of the certificates, are much less effectual or available to command the title, the dominion, or the control of the stock than the mere possession of the certificates themselves. The indorsement and delivery, or the mere delivery, of the certificates, without entry of the transfer upon the books of the corporation, is generally held to constitute a valid sale of the stock between vendor and vendee, or a completed gift of it between donor and donee. Such an indorsement and delivery of the certificates generally enables the holder to enforce a transfer of the title to the stock upon the books of the corporation.

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If, by an indorsement and delivery of the certificates of stock with the donative intention, the defendant had completed his gift to his wife, a court of equity would have compelled the corporation to transfer the shares upon its books. The difficulty with this case is that the certificates of shares were not delivered, no intention on the part of the donor to immediately

renounce dominion and control of the stock was formed, and no executed gift was made. This was the situation: Grumbles made the assignment of his interest in the drug business to his wife on May 14, 1899. His interest was 110 shares in the stock of the corporation which was operating that business, and he held the certificate of ownership of these shares while the title of them stood in his name upon the books of the company. The holding of the certificate of shares of stock is the customary and most effectual means of using the rights and privileges which the stock confers. The indorsement and delivery of this certificate is the usual and most efficient way of transferring the stock. Three things were essential to a valid gift of this stock by the defendant: (1) A fixed purpose, at the time he made the assignment to his wife, to then divest himself of all title, dominion, and control of the stock, and to vest these irrevocably in his wife; (2) the immediate and perfected execution of this purpose; and (3) the delivery to his wife of the most effectual means of using and reducing the stock to possession. The indorsement and delivery of the certificate to his wife would have proved all these prerequisites. Such an indorsement and delivery was the true, customary, and most effectual way to evidence the intention to transfer the title, the control, and the dominion of the stock, and to accomplish that purpose. The fact that the defendant did not pursue this plain method is in itself cogent proof that he intended to accomplish no such purpose. He made no indorsement or delivery of the certificate. He made no assignment of the stock by name or description, but simply delivered to his wife an assignment of his interest in the business of the corporation, which she never used to obtain control or dominion of the stock, but which she quietly tucked away and never brought to light until creditors were pressing her husband for the payment of his debts, nearly four years after she received the assignment. Neither Grumbles nor his wife gave notice to the corporation of this nominal conveyance until after his bank had failed, in February, 1903, and his creditors were clamoring for payment. He received annual dividends upon the stock from May, 1899, until February, 1903. In the latter month a stock dividend of 144 additional shares accrued upon his stock, and he took the additional shares in his own name, and finally, after he had become insolvent, he trans-

ferred all these shares to his wife in February, 1903, not by the use of the dormant assignment of 1899, but by the usual and most effectual method—by an indorsement and delivery of the certificates. These are all the facts in this case from which the intention of the defendant when he made the assignment of 1899 may be deduced. He knew how to divest himself of title, of control, and dominion of the stock; for he did so by indorsement and delivery of the certificates in February, 1903. If he ever intended to do so before that time, the evidence of that intention in this record is imperceptible. A man is presumed to intend the natural and probable consequences of his acts. The consequences of the acts of Grumbles here were that, although he delivered to his wife the dormant assignment, he retained the apparent title, the actual control and dominion of the stock, and the enjoyment of every right and privilege it commanded, for nearly four years after he parted with the written assignment, and until the pressing claims of creditors admonished him that his stock was liable to be applied to the payment of his debts, and then for the first time he invoked its aid. The deduction from these facts is irresistible. It is that the defendant Grumbles intended in 1899 exactly what he did in that and the subsequent years. He intended to retain the appearance of title, the actual dominion, control, and beneficial use of his stock, until the claims of creditors or his own decease compelled him to relinquish them. That intention is fatal to the existence of the gift he asserts. Gallagher v. Donahy (Kan.) 69 Pac. 330.

But, even if Grumbles had intended to renounce dominion and control of the stock, he could not have accomplished that purpose by the mere delivery of this assignment, because it had not that effect, and because he failed to deliver to his wife the most effectual and appropriate means of reducing the stock to possession and use—the certificate of the shares. The assignment was by its terms a conveyance of his interest in the drug business and a covenant to defend the title to that interest, together with all the rights and privileges enjoyed by him in the premises. It did not transfer the beneficial use of the stock, the privilege of voting it and of drawing dividends upon it, because these rights and privileges were transferable only by a transfer of the title of the stock upon the books of the corporation, upon

the surrender of the certificate. The possession of the certificate was the sine qua non of that transfer, and the most extensive effect that the assignment could have had was to give Mrs. Grumbles the covenant or promise of her husband that he would deliver the certificate, so that she could transfer the stock and secure its beneficial use. But a gift of a covenant or promise is void, because it is unexecuted, and every valid gift must be executed and complete. Harris v. Clark, 3 N. Y. 93, 112, 51 Am. Dec. 352.

It is said that the assignment gave the donee the right to compel the defendant to surrender the certificate and transfer the stock. But the fact is that Grumbles' possession of the certificate left him the unrestricted power, by the surrender of the certificate and the sale of the stock to a bona fide purchaser, to deprive his wife of every right under the assignment, except a right of action for damages for conversion of the stock. A gift of a right of action for conversion of stock is not a gift of stock. The present transfer of dominion and control of the stock, so that the donor cannot deprive the donee of it, is essential to a valid gift of stock. The gift of a right of action for conversion of it, or of the possibility of compelling a delivery or transfer of it by a suit in equity, is not sufficient, when the donor retains the unrestrained power to place the title, possession, and control of the stock beyond the reach of the donee at any time, and thereby to defeat such a suit in equity. Again, if the assignment had been in terms a conveyance of the stock, it would not have sustained the defendant's claim of a gift, because he failed to deliver the certificate of the shares. The certificate was the usual and most effective means of reducing the stock to possession and use. It was present. It was capable of manual delivery. In this state of the case its delivery was indispensable to a valid gift, and a separate assignment of the stock without a delivery of this certificate was ineffective.

Counsel for the defendant argue that a complete gift may be made by a written assignment or conveyance, without a delivery of the subject of the gift, and cite authorities to support this position. It is true that in cases where manual delivery of the subject of the gift, or of the evidences which command it, is impracticable or impossible, and in cases in which a written conveyance is the most effectual mode of divesting the donor

of dominion and control of the thing, such a conveyance is sufficient. But it is equally true that a written assignment is utterly inadequate, where the delivery of the subject of the gift or the delivery of the evidences of it is practicable, and the latter is the more ready and efficient way of commanding the dominion and control of the subject of the gift. Thus in Grymes v. Hone, 49 N. Y. 17, 10 Am. Rep. 313, a gift by means of a written assignment of 20 out of 120 shares of stock that were evidenced by a single certificate was sustained; in Bond v. Bunting, 78 Pa. 210, a gift by an assignment of all over $5,600 that should be realized from an insurance policy was maintained; and in Banks' Adm'r v. Marksberry, 3 Litt. 276, a gift by an assignment of the future income of a slave was held valid—without a delivery of the subjects of the gift. But the reason for these decisions is that the delivery of these subjects was impracticable, because others than the donee had rights and interests in them which entitled them to their possession. Again, a gift by means of an assignment made by the owners of a fund that had been collected from an insurance policy and was in the hands of executors of an estate was a good gift without a delivery of the money, because it was not in the possession of the donors, and hence was incapable of manual delivery by them. Matson v. Abbey, 70 Hun 475, 24 N. Y. Supp. 284. So in Tarbox v. Grant, 56 N. J. Eq. 204, 39 Atl. 378, 380, a trust deed to a third party, trustee, for the benefit of the children of the grantor, of his equitable interest in the property, was sustained as a creation of a trust; and in Walker v. Crews, 73 Ala. 412, a deed of promissory notes which by its terms reserved the right in the donor to retain and collect the notes, and to invest and reinvest their proceeds for the donee, was sustained as a gift and a declaration of trust, without a delivery of the notes.

But an instrument like the assignment at bar, which was executed as an absolute conveyance, and which contains no declaration of trust, cannot be sustained as the creation or the declaration of a trust for the benefit of the donee. Wadd v. Hazelton, 137 N. Y. 215, 219, 220, 33 N. E. 143, 21 L. R. A. 693, 33 Am. St. Rep. 707; Young v. Young, 80 N. Y. 437, 36 Am. Rep. 634; In re Estate of Soulard, 141 Mo. 659, 43 S. W. 617; Richards v. Delbridge, L. R. 18 Eq. 11, 14, 15, overruling

Morgan v. Malleson, L. R. 10 Eq. 475, and Richardson v. Richardson, L. R. 3 Eq. 686; Milroy v. Lord, 4 De Gex, Fisher & Jones, 264, 274, in which Lord Justice Turner well said: "If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust; for then every imperfect instrument would be made effectual by being converted into a perfect trust." Again, a recorded deed of real estate, or a recorded brand of cattle, in the name of the donee, without a delivery of the subjects of the gifts, may well be sustained, because the donor, by placing the record title in the donee, places the property irrevocably beyond his dominion or control. Holmes v. McDonald, 119 Mich. 563, 78 N. W. 647, 75 Am. St. Rep. 430; Love v. Francis, 63 Mich. 181, 29 N. W. 843, 6 Am. St. Rep. 290; Adams v. Adams, 21 Wall. 185, 191, 22 L. Ed. 504; Hillebrant v. Brewer, 6 Tex. 45, 55 Am. Dec. 757. But "if an owner of shares of stock in a corporation, intending to give them to A., should take the scrip to the office of the company and surrender it, and receive new scrip in the name of A., has he by this change of title on the books of the company, while retaining the entire possession and control of the scrip, and without any delivery thereof to A., accomplished a valid executed gift of the ownership of the shares to his intended donee? We should say clearly not." Matter of Crawford et al., 113 N. Y. 560, 567, 21 N. E. 692, 5 L. R. A. 71.

The reason for the difference between a gift executed by a recorded deed of real estate and one unexecuted by a failure to deliver certificates of stock is that the record title to real estate controls and draws to it the possession and dominion of the property and of its title deeds, while, on the other hand, the possession of certificates of shares of stock commands the dominion and control and the record title of the stock.

The clew to the labyrinth of decisions upon this subject is the reason of the rule which makes delivery of the thing, or of the most available means of commanding its dominion and control, indispensable to the validity of a gift. That reason is the imperative necessity of requiring the renunciation by the donor, not only of all possession, dominion, and control of the thing, but of all appearance thereof, lest by such an appearance he should lead creditors, purchasers, and others to believe, and to

credit him in the belief, that he is the owner of that which in reality belongs to his donee, and lest by fraud and perjury gifts be proved which never in fact existed. Yancey v. Field, 85 Va. 756, 8 S. E. 721. This reason of the rule conditions the nature of the delivery it requires, and demands that that delivery shall, in every case, whether evidenced by written assignment or oral statement, consist as far as practicable of a delivery of that thing which will most effectually and irrevocably divest the donor of the dominion and the control of the subject of the gift, and thus of the appearance of title, whether that thing be the subject itself, a symbol of the subject, a written assignment of it, or the patent evidences of it whose delivery constitute the most effectual mode of transferring the dominion over it.

In the case at bar that thing was the certificate of the shares. The delivery of that certificate was the most effectual mode of divesting the defendant of his title, of his dominion, and of his control of the stock and of the appearance thereof. It was the most efficient way of avoiding the mischief which the rule of delivery was established to prevent, while, on the other hand, the delivery of the dormant and unused assignment, unaccompanied with the delivery of the certificate, was the least effective for these purposes and the most efficient way of promoting the mischief at which the rule was leveled. The failure to deliver the certificate was fatal to the alleged gift, because without its delivery the dormant assignment did not irrevocably deprive the defendant of the dominion and control of the stock, but left them all perfectly amenable to his will.

This conclusion is not without support in the decisions of the courts. In Basket v. Hassel, 107 U. S. 602, 614, 2 Sup. Ct. 415, 27 L. Ed. 500, a case in which the Supreme Court held that the delivery of a certificate of deposit to an intended donee, with an indorsement upon it to pay it to the latter's order, but not until the donor's death, was not a valid gift, because it did not deprive the donor of the present power of dominion and control, that court declared, as a result of a review of the authorities relative to the delivery of a chose in action, that the rule was—

"That the instrument or document must be the evidence of a subsisting obligation, and be delivered to the donee, so as to vest him with an equitable title to the fund it represents, and

to divest the donor of all present control and dominion over it, absolutely and irrevocably."

In Knight v. Tripp, 121 Cal. 674, 676, 679, 54 Pac. 267, the Supreme Court of California held a formal written assignment delivered to the donee insufficient to sustain a claim of a gift, and said:

"There must be both a purpose to give and the execution of this purpose. The purpose must be expressed, either orally or in writing, and it must be executed by the actual delivery to the donee of the thing given, or of the means of getting possession and enjoyment thereof. A written instrument may be available for designating the property intended to be given, as well as to show the intention of the donor; but by itself it no more establishes the gift than would the same words orally delivered by the donor. * * * It is the fact of delivery that converts the unexecuted and revocable purpose into an executed and complete gift."

Other authorities almost without limit could be cited in support of the position that this alleged gift was incomplete and invalid, because the defendant failed to renounce dominion and control of its subject; but perhaps our views have already been sufficiently illustrated, and further discussion will be omitted.

The dormant assignment of May 14, 1899, did not effect a valid gift of the stock of the defendant Grumbles, because he then had no intention to immediately and irrevocably divest himself of the control and dominion of the stock, because he retained the possession of the certificate, and all the rights and privileges which the stock conferred, until February, 1903, and because he failed until that time to irrevocably divest himself of the title, dominion, and control of the stock. As this stock remained his property until many months after his indebtedness to the plaintiff accrued, his voluntary transfer of it to his wife in 1903 was in the eyes of the law a fraud upon the plaintiff, and the judgment of the circuit court that the attachment be dissolved, and the garnishee, Mary E. Grumbles, be discharged, cannot be sustained.

The judgment of the court below, that the attachment be dissolved, and that the garnishee, Mrs. Mary E. Grumbles, be discharged, must be reversed, and the case must be remanded to the Circuit Court.

Gifts Causa Mortis.

APACHE STATE BANK v. DANIELS.

121 Pac. 237, 32 Okla. 121. 1911.

Proceeding by the Apache State Bank against Florence Daniels, administratrix of the estate of James Daniels, deceased. Judgment for defendant, and plaintiff brings error. Reversed.

AMES, C. The plaintiff instituted this proceeding by filing in the county court of Rogers county an application to require the defendant, who was administratrix of the estate of James Daniels, deceased, to inventory 168 shares of the capital stock of the Farmers' & Merchants' Bank of Catoosa.

The defendant claims title to the stock by virtue of a gift from her husband while he was on his deathbed, and it appears from the evidence that the stock was in a tin box in the vault of the Catoosa bank; that the defendant and her husband lived in a room adjoining the banking room; that the deceased died on Sunday afternoon; that the defendant knew the combination and was accustomed to opening the vault; that a few hours prior to his death the deceased said to his wife that he wished to give her his bank stock and other property in the box, and for her to take the key and not let anybody have it; that at the time there were two keys to the box, one ordinarily carried by the deceased, and the other by the defendant, but that the defendant had both keys in her possession at the time of this gift; and that upon these words being spoken she transferred the key of the deceased from his key ring to her key ring, but did not enter the vault or take possession of the box.

The questions which are raised by the record are as follows: (1) Did the district court have jurisdiction of this appeal? (2) Was it reversible error for the district court to impanel a jury and submit the issues for a general verdict? (3) Was the delivery sufficient to constitute this a valid donatio causa mortis? (4) If so, does the statute providing that the capital stock of a corporation is personal property and can only be transferred by delivery and indorsement defeat the gift? (5) Was the defendant, under the circumstances of this case, a competent witness for herself? * * *

[3] 3. The difficult question in the case is whether, under the facts, there was a sufficient delivery of the subject matter of the gift.

As previously stated, the court submitted this case to a jury for a general verdict, and in doing so instructed the jury as though it were an ordinary action of law. While that was improper, still an examination of the instructions will give the view of the law which the court applied to the facts in this case. The fourth instruction was as follows: "A delivery of keys to a locked receptacle accompanied by words of gift, or articles contained therein, is sufficient to transfer the contents of the receptacle, and in this case, if you find that James Daniels delivered to the defendant a key or keys to the box containing the bank stock in question, and stated by word of mouth that he gave her such bank stock, then I instruct you that such words of gift, together with the delivery of a key to the box containing the stock, would constitute a valid gift and would vest the equitable title to the bank stock contained in such box in the defendant herein."

It will be observed that no distinction is made between delivering the key of a receptacle which cannot be conveniently moved on account of its size or bulk, and one which is small and easily handled. The bank stock involved was kept in a small tin box about 6 inches wide, 12 inches long, and a few inches deep, to which deceased and his wife, the defendant, each carried a key. This box in turn was kept in the vault of the bank. The bank was conducted in a small room about 18 feet wide and 30 feet long; the rear 10 feet of which being cut off by a partition and used by the deceased and his wife as their home. The vault was at the rear of the banking room, and between it and the bedroom. It opened by an ordinary combination lock, which the defendant was in the habit of opening; she having been for two or three years the assistant cashier of the bank. The deceased was the cashier, and he and his wife seemed to have been the only regular employes. The deceased had been sick for about 10 days, during which time the president of the bank had assisted the defendant as much as he could; but he does not seem to have been an active officer, and did not know the combination. The money and valuable papers of the bank were kept in a steel safe, inside of the vault, governed by

a time lock; but the tin box was not kept in that safe, but merely set in the vault along with the boxes of other customers. During his illness the deceased seemed to have been attended by the doctor, his wife, and a sister. He died on Sunday afternoon, and the conversation which has been quoted took place about two hours before his death. His sister was not present at the time. Nothing was done until after the death of the deceased, other than that detailed in the testimony quoted, and the question is whether there was such a delivery as to make this a valid donatio causa mortis. In reaching a conclusion, we have been assisted by able briefs and oral argument of counsel. We find a conflict in the authorities difficult to reconcile, and it is not our purpose to undertake an exhaustive review, or even citation, of the many authorities on the subject, although we have examined all that have been cited by counsel, as well as others disclosed by our own research. The question involved being presented for the first time in this state, and courts of high standing differing from each other on the subject, causes us to resort to the general policy of our own state, in order to get a safe foundation on which to build.

The bank stock involved in this case comprises practically the entire estate of the deceased, and, being disposed of by him on his deathbed, amounts in substance to a testamentary disposition. Of course, we do not confuse a donatio causa mortis with a testamentary disposition, but merely call attention to the fact that, under the circumstances of this case, this donation is substantially equivalent to a testamentary disposition. We inquire, therefore, as to the policy of the people of this state relative to testamentary dispositions. The policy is evidenced by our statutes, brought forward from the territory of Oklahoma by a direct vote of the people in the adoption of the Constitution.

In the absence of a valid testamentary disposition, the law prescribed the succession and preserves a just and equitable distribution amongst relatives of the deceased. However, one who is not satisfied with these general rules of succession may dispose of his property otherwise, but in doing so he must comply with the exact procedure authorized by law. Unless his will is entirely in his own handwriting, he must execute it in the presence of two witnesses, at the time he must declare to them it is his last will and testament, and he must request

them to sign as witnesses, and they must sign it in his presence and in the presence of each other. Unless these formalities are substantially complied with, the will is void, and the courts will not stop to inquire or to enforce the intention of the deceased, but will require the distribution of his property amongst his heirs according to the will of the people. An unwritten will is recognized by our law only in case the decedent, at the time of his death, was in the military service and in actual contemplation of death, or in expectation of immediate death from an injury received the same day, and it must then be proved by two witnesses present at the making of it, and even then "the estate bequeathed must not exceed in value the sum of one thousand dollars." Snyder's Statutes, § 8894. It is apparent, therefore, that the policy of our people is to insure the distribution of an estate according to the statutory rule of succession, unless the deceased in due form, and with proper solemnities, has declared a contrary purpose.

A gift causa mortis is not mentioned in our statutes, and therefore comes to us as a part of the common law; but in taking it we must take it in connection with the public policy of our state as evidenced by its statutes. The common law in turn gets the idea from the Roman law, and in Roman law, according to the Institutes of Justinian, five witnesses were required, in addition to the delivery of the donation. At the common, however, no specific number of witnesses is required; but the gift must be established by clear and convincing evidence, and it must be accompanied by a delivery of the subject matter. Mere words, of course, cannot constitute a gift, either inter vivos or causa mortis, because that would conflict with the fundamental notion of consideration as the basis of contract. Mere words unaccompanied by delivery could only be a promise, and there being no consideration the promise could not be enforced, and therefore the gift would not be complete. In order that the gift be valid, it must be completely executed, because if there remains anything to be done the donor may refuse to do it. When a gift has been completed by the actual delivery of the subject matter, it, of course, is valid, and these principles apply to a gift causa mortis as well as inter vivos.

A gift causa mortis differs from a gift inter vivos in that it is revocable, while it differs from a legacy in that the donee

takes direct from the donor and not through his estate. A gift causa mortis may, according to some of the authorities, be revoked by the donor at any time prior to his death. His recovery is, ipso facto, a revocation, and its subject matter is subject to the payment of debts. In view, therefore, of the nature of this gift, we feel justified in considering it in connection with the policy of our law concerning testamentary dispositions.

The general principles which we have laid down are stated in many authorities, some of which are as follows: 3 Pomeroy's Equity Jurisprudence (3rd Ed.) pars. 1146-1151; Ward v. Turner, 2 Ves. Sen. 431 (same case 28 Eng. Rep., full reprint, 275); Basket v. Hassell, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. Ed. 500; Gano v. Fisk, 43 Ohio St. 462, 3 N. E. 532, 54 Am. Rep. 819; Newman v. Bost, 122 N. C. 524, 29 S. E. 848; Parish v. Stone, 14 Pick. (Mass.) 198, 25 Am. Dec. 378 (Shaw, C. J.); Harris v. Clark, 3 N. Y. 93, 51 Am. Dec. 352; Raymond v. Sellick, 10 Conn. 480; Drew v. Hagerty, 81 Me. 231, 242, 17 Atl. 63, 3 L. R. A. 230, 10 Am. St. Rep. 255; Cutting v. Gilman, 41 N. H. 147, 152.

We now approach the exact question as to whether there was a sufficient delivery in this case. Ward v. Turner, decided by Lord Hardwicke in 1752, is one of the earliest cases containing an exhaustive discussion of this subject, and it is interesting to note in passing that Lord Mansfield, then Mr. Murray, was of counsel in this case. At page 442 of 2 Ves. Sen. (page 282 of the reprint), Lord Hardwicke says: "It is argued that though some delivery is necessary, yet delivery of the thing is not necessary, but delivery of anything by way of symbol is sufficient. But I cannot agree to that; nor do I find any authority for that in the civil law, which required delivery to some gifts, or in the law of England, which required delivery throughout. Where the civil law requires it, they require actual tradition, delivery over of the thing. So in all the cases in this court delivery of the thing given is relied on, and not in name of the thing."

Mr. Justice Matthews, in delivering the opinion of the court, in Basket v. Hassell, at page 614 of 107 U. S., at page 422 of 2 Sup. Ct. (27 L. Ed. 500), says: "The point, which is made clear by this review of the decisions on the subject, as to the nature and effect of a delivery of a chose in action, is, as we think, that the instrument or document must be the evidence

of a subsisting obligation and be delivered to the donee, so as to vest him with an equitable title to the fund it represents, *and to divest the donor of all present control and dominion over it, absolutely and irrevocably,* in case of a gift inter vivos, but upon the recognized conditions subsequent, in case of a gift mortis causa; and that a delivery which does not confer upon the donee the present right to reduce the fund into possession by enforcing the obligation, according to its terms, will not suffice."

In 20 Cyc. 1234, it is said: "Property kept in a bureau, chest, or trunk not readily accessible, and ponderous or bulky articles kept in a warehouse, may be delivered by delivering the key to the receptacle with the intent to pass title to the property therein contained. But the delivery of the key to a receptacle which is near at hand and contains property which might easily be removed and an actual delivery made is not sufficient, as it is not the best delivery possible under the circumstances."

Chancellor Kent says: "Delivery, in this, as in every other case, must be according to the nature of a thing. It must be an actual delivery, so far as the subject is capable of delivery. * * * When the gift is perfect, by delivery and acceptance, it is then irrevocable. * * * If the subject of the gift be not capable of actual delivery, there must be some act equivalent to it." 2 Kent's Commentaries, 555, 556.

In Drew v. Hagerty, 81 Me. 231, 242, 17 Atl. 63, 64 (3 L. R. A. 230, 10 Am. St. Rep. 255), it is said: "We think this ruling was correct. If the act of delivery was for no other purpose than to invest the donee with possession, no reason is perceived why it might not be dispensed with, when the donee already had possession. But such is not its only purpose. It is essential in order to distinguish a gift, causa mortis, from a legacy. Without an act of delivery, an oral disposition of property, in contemplation of death, could be sustained only as a nuncupative will, and in the manner and with the limitations provided for such wills. Delivery is also important as evidence of deliberation and intention. It is a test of sincerity and distinguishes idle talk from serious purposes. And it makes fraud and perjury more difficult. Mere words are easily misrepresented. Even the change of an emphasis may make them convey

a meaning different from what the speaker intended. Not so of an act of delivery. Like the delivery of a turf, or the delivery of a twig, in the ancient mode of conveying estates, or the delivery of a kernel of corn, or the payment of one cent of the purchase money, to make valid a contract for the sale of cargo of grain, an act of delivery accomplishes that which words alone cannot accomplish. Gifts, causa mortis, ought not to be encouraged. They are often sustained by fraud and perjury. It was an attempt to sustain such a gift by fraud and perjury that led to the enactment of the statute for the prevention of fraud and perjury."

In Cutting v. Gilman, 41 N. H. 147, 152, the court say: "A delivery is indispensable to the validity of a gift causa mortis. It must be an actual delivery of the thing itself, or of the means of getting possession and enjoyment of the thing, and there must be something amounting to delivery at the time of the gift; for it is not the possession of the donee, but the delivery to him by the donor, that is material. An after-acquired possession, or a previous and continuing possession, of the donee, though by authority of the donor, is insufficient. Miller v. Jeffress, 45 Va. 472; Kenney v. Public Admr., 2 Bradf. Sur. (N. Y.) 319."

In Smith v. Zumbro, 41 W. Va. 623, 24 S. E. 653, paragraph 1 of the syllabus is as follows: "Delivery at the time of making the gift is essential to a perfect gift causa mortis. It is not the possession of the donee, but the delivery to him by the donor, that is material. An after-acquired possession or a previous and continuing possession of the donee, though by the authority of the donor, is insufficient."

In an exhaustive note at page 895 of 99 Am. St. Rep., the author cites a great many cases sustaining the following propositions: "It is absolutely necessary that there be a delivery of the subject matter of a gift causa mortis during the donor's lifetime, and in this respect it does not differ from a gift inter vivos." (Citing cases.) "Not only must there be a delivery, but the possession of the donee must be a continued one, and the donor have parted with all control and dominion over the subject matter of the gift in favor of the donee, so as to put it out of his power to repossess himself thereof, and no further act be required on his part to vest the title in the donee." (Citing cases.)

In Newman v. Bost, 122 N. C. 524, 29 S. E. 848, the deceased, in his last illness, sent for the plaintiff, the donee, who was not in the room, and asked her to hand him his private keys, which she did. He then handed her the bunch of keys and told her to take them and keep them; that he desired her to have them and everything in the house. He then pointed out certain articles of furniture in the house, and asked that his chamber door be opened, and pointed in the direction of the halls and other rooms, and repeated that everything in the house was hers; he wanted her to have everything. Amongst other things he pointed out was a bureau, which was in the room, and one of the keys which he handed her was a key to this bureau, and a bureau drawer which this key unlocked contained in it a life insurance policy payable to the deceased's estate, together with other papers, and there was no other key that unlocked the drawer. After stating the result of the authorities, at page 529 of 122 N. C., at page 849 of 29 S. E., the court say: "It is a doctrine, in our opinion, not to be extended, but to be strictly construed and confined within the bounds of our adjudged cases. We were at first disposed to confine it to cases of actual manual delivery, and are only prevented from doing so by our loyalty to our own adjudications." At page 532 of 122 N. C., at page 850 of 29 S. E., it is said: "Following this case, founded on Ward v. Turner, we feel bound to give effect to constructive delivery, where it plainly appears that it was the intention of the donor to make the gift, and where the things intended to be given are not present, or, where present, are incapable of manual delivery from their size or weight. But where the articles are present and are capable of manual delivery, this must be had." And again at pages 533 and 534 of 122 N. C., at page 850 of 29 S. E.: "It being claimed and admitted that the life insurance policy was present in the bureau drawer in the room where it is claimed the gift was made, and being capable of actual manual delivery, we are of the opinion that the title to the insurance policy did not pass to the plaintiff, but remained the property of the intestate of the defendant. But we are of the opinion that the bureau and any other article of furniture, locked and unlocked by any of the keys given to the plaintiff, did pass, and she became the owner thereof. This is upon the ground that while these articles were present, from

their size and weight they were incapable of actual manual delivery; and that the delivery of the keys was a constructive delivery of these articles, equivalent to an actual delivery if the articles had been capable of manual delivery."

In Keepers v. Fidelity Title & Deposit Co., 56 N. J. Law, 302, 28 Atl. 585, 23 L. R. A. 184, 44 Am. St. Rep. 397, the deceased gave to her sister the key to a box, declaring at the time that she thereby gave her all that the box contained. The box was in another room of the same house, in a locked closet of which deceased's mother had the key. In holding that this was not a sufficient delivery of the papers and securities contained in the box, the court say (page 308 of 56 N. J. Law, page 587 of 28 Atl., page 186 of 23 L. R. A., page 401 of 44 Am. St. Rep.): "We are not willing to approve the extreme views which have been adopted in the cases cited. We agree with the sentiment expressed in Ridden v. Thrall, 125 N. Y. 572 [26 N. E. 627, 11 L. R. A. 684], 21 Am. St. Rep. 758, that 'public policy requires that the laws regulating gifts causa mortis should not be extended, and that the range of such gifts should not be enlarged.' When it is remembered that these gifts come into question only after death has closed the lips of the donor; that there is no legal limit to the amount which may be disposed of by means of them; that millions of dollars worth of property are locked up in vaults, the keys of which are carried in the owners' pockets; and that, under the rule applied in those cases, such wealth may be transferred from the dying owner to his attendant, provided the latter will take the key and swear that it was delivered to him by the deceased for the purpose of giving him the contents of the vault—the dangerous character of the rule becomes conspicuous. Around every other disposition of the property of the dead the legislative power has thrown safeguards against fraud and perjury. Around this mode the requirement of actual delivery is the only substantial protection, and the courts should not weaken it by permitting the substitution of convenient and easily proven devices."

In Hatch v. Atkinson, 56 Me. 324, 330, 331 (96 Am. Dec. 464), in deciding that securities contained in a trunk did not pass by delivery of the key, the court say: "If it was the key only, as the brother swears, then very clearly there was no delivery or possession given, even for a moment; for, although

delivery of the key of a warehouse, or other place of deposit, where cumbrous articles are kept, may constitute a sufficient constructive or symbolical delivery of such articles, it is well settled that delivery of the key of a trunk, chest, or box, in which valuable articles are kept, which are capable of being taken into the hands, and may be delivered by being passed from hand to hand, is not a valid delivery of such articles. The rule is that the delivery must be as perfect and complete as the nature of the articles will admit of. While a constructive delivery may be sufficient for large or cumbrous articles, it will not be sufficient for small articles, capable of a more perfect and complete delivery."

The Supreme Court of New York, in Cooper v. Burr, 45 Barb. 9, however, held that the delivery of keys to a bureau and trunks, with appropriate words of gift, is sufficient delivery of coin and jewelry therein contained; the syllabus containing the following: "C., who had been confined to her room by illness for 19 or 20 years, and to her bed for 5 or 6 years, prior to her death, kept in her room a bureau and trunks containing gold and silver coin and jewelry. About 6 weeks before her decease, handing to the plaintiff, who had lived with and taken care of her for 27 years, the keys of the bureau and trunks, she said: 'Mary, here are these keys. I give them to you. They are the keys of my trunks and bureaus. Take them and keep them, and take good care of them. All my property, and everything, I give to you. You have been a good girl to me, and be so still. * * * You know I have given it all to you. Take whatever you please. It is all yours, but take good care of it.' Held that the language of the donor, accompanied by a delivery of the keys to the trunks and bureau, evinced the intention of the donor, and placed the donee in possession of the means of assuming absolute control of the contents at her pleasure, and constituted a valid gift of the coin and jewelry in the trunks and bureau."

In Walsh v. Sexton, 55 Barb. (N. Y.) 251, 256, the deceased, during her last sickness, handed to the donee a box containing securities, with appropriate words of gift. It is held that this was sufficient; but Judge Peckham, in delivering the opinion of the court says: "I concur in the views expressed by the court in Brown v. Brown, 18 Conn. 410 [46 Am. Dec. 328], against

both the principle and the policy of sustaining such a gift. But the authorities are the other way. In my judgment this doctrine is fraught with the greatest dangers. It leads into temptation, from which we all pray to be delivered, and it greatly facilitates frauds. The whole thing is wrong. But it is settled by authority, and we are not at liberty to reverse it." So far as New York, therefore, is concerned, we have the rule claimed by the plaintiff in this case; but, the reason for that rule having been repudiated, it ceases to be of importance in other states.

In Virginia, in the case of Thomas v. Lewis, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848, it is held that the delivery of the keys of a box, deposited in the vault of a bank, is a sufficient constructive delivery of the contents of the box; but in that case the box itself was at a distance from the donor, and a strong dissenting opinion was filed. In this dissent Judge Lacy quotes the following language from Lord Eldon's opinion in Duffield v. Elwes, 1 Bligh (N. S.) 533: "Improvements in the law, or some things which have been considered improvements, have been lately proposed; and if, among those things called 'improvements,' this donation mortis causa were struck out of our law altogether, it would be quite as well."

In Debinson v. Emmons, 158 Mass. 592, 33 N. E. 706, it is said in the syllabus: "A valid gift causa mortis takes place where the donor, on her deathbed, delivers to the donee the keys of her trunk, which is in the room, and declares that the trunk and its contents are the donee's property."

Other cases might be cited tending to support both sides of this controversy; but we have cited enough to show the reason of the courts as well as the conflict of judicial decisions. It seems to us that the weight of authority, the better reason, and the policy of our law, as evidenced by our statutes, are against this gift, and we should not permit our sympathy to make a bad rule which, while perhaps not in this case, would eventually encourage fraud and perjury. * * * We are therefore of the opinion that the case should be reversed, and judgment rendered for the plaintiff in error.

PART II

BAILMENTS

CHAPTER X.

THE NATURE OF BAILMENT.

Bailment or Sale—Effect of Option to Buy or Sell.

SAVAGE v. SALEM MILLS CO.

48 Ore. 1, 85 Pac. 69. 1906.

Action by George O. Savage against Salem Mills Company. From a judgment for plaintiff, defendant appeals. Modified.

This is an action to recover for wheat delivered to the defendant company by plaintiff and his assignors.

BEAN, C. J. (after disposing of certain preliminaries). We come, then, to the merits of the controversy. The facts, as they appear from the pleadings and findings, are that on September 22, 1899, and for many years prior thereto, the defendant had owned and operated a flouring mill at Salem, in this state. Connected with the mill by means of mechanical wheat conveyors were storage houses or bins in which wheat purchased by the defendant to be manufactured into flour and such as it received from the neighboring farmers were mixed and commingled. According to the usual course of its business, when wheat was received from a farmer it was weighed by the defendant's weigher and a load check therefor was delivered to the farmer, showing the date and quantity of wheat delivered, which check could, if desired by the holder, be exchanged for a receipt in the form heretofore alluded to. No such receipt, however, was ever issued to the plaintiff and to but two of his assignors. After the wheat was received and weighed, it was, with the knowledge and by the consent of the farmer, conveyed into the warehouse and mixed and commingled with wheat belonging to

the defendant, and thus became a part of the consumable stock of the mill, and thereafter, at its own convenience and pleasure and without further authority from the farmer, the defendant sold and shipped the wheat or ground it into flour or other mill products and disposed of the same for its own account and benefit. The farmer had a right at any time to demand the return of an equal quantity of wheat of like kind with that delivered or the market price of such wheat at the time of the demand, and the defendant had the right to and generally did settle the transaction by paying the market value of wheat of like quality as that delivered, but in some instances settlements were made by delivering to the holder of the receipt wheat, equal in quality and quantity with that delivered, on payment of a certain sum per bushel for storage and for sacks. On September 22, 1899, the mill and warehouse were, with their contents, either totally destroyed by fire or so damaged as to be worthless. At the time of the fire there was due from the defendant to the farmers, including the plaintiff and his assignors, 122,534 bushels and 54 pounds of wheat, but of this amount only 105,372 bushels and 32 pounds were in the warehouse.

Upon this state of facts, the question for decision is whether the transaction between the plaintiff and his assignors and the defendant constituted a bailment or a sale. If the former, the title remained with the bailors and the loss must fall upon them, but if the latter, the title passed to the defendant at the time of the delivery, and thereafter the grain was held at its risk. It is often difficult to determine whether a particular transaction is a sale or a bailment, and especially so when it involves grain delivered to a person and by him mixed and mingled in a common mass with grain belonging to himself or other parties. If a specific amount of grain is delivered by the owner to be returned, either in its original or in an altered form, when called for, there is of course a plain case of bailment, but, when the grain of different owners is mixed and mingled in a common mass by their consent, a different and more difficult question arises. The original idea of a bailment contemplated the return of the identical article delivered as soon as the purpose of the bailment was accomplished. 2 Kent, Lect. 40; Story, Bailment, §§ 1, 2. But the business of storing, transporting,

and handling grain has grown to such proportions in recent years as necessarily to have wrought a change or modification in the doctrine requiring the subject of bailment to be returned to the bailor. The delivery to public warehouses or elevators of thousands of bushels of grain for storage and safe-keeping by hundreds of owners, renders it impracticable, if not impossible, to keep that of the several owners separate so as to return the identical grain delivered, and this is no longer expected or required. The only separation now called for by law is to keep grain of the same class in bins by itself so the owner may have returned to him grain of the kind and quality delivered, and therefore upon the deposit of grain with a warehouseman to be mixed with the grain of other persons, the depositor becomes the owner of his pro rata share of the entire mass, and the transaction is a bailment, and not a sale. Brown v. Northcutt, 14 Or. 529, 13 Pac. 485; McBee v. Ceasar, 15 Or. 62, 13 Pac. 652; Hamilton v. Blair, 23 Or. 64, 31 Pac. 197. But the warehouseman is not authorized to use, sell, or dispose of the grain stored with him or any part thereof without the consent of the owners. He may, from time to time, take from the common mass, upon the order or at the request of an owner, grain in amount equal to that stored for or by such owner, but he is required always to retain of the grain so stored sufficient to supply the other storers, and cannot use or dispose of any part thereof for his own benefit. He is a mere custodian of the grain, with no right to use it in any way, and herein lies the essential difference between a bailment and a sale. In the one case the title to the property remains in the depositor and the bailee is but a mere custodian, while in the other he may use and treat the grain as his own; the depositor relying upon his personal credit for the value thereof either in kind or in money. Where one delivers grain to another under an agreement that the identical grain or grain of similar kind and quality from the common mass into which it was placed shall be returned, there is a bailment, and the right of property remains in the bailor, but when, either from the express agreement of the parties or from the general course of business, the party receiving the grain has a right to use it in his business and as a part of his consumable stock and is not obliged to return the identical grain nor grain of similar grade and quality from the common mass,

but may discharge his obligation to the storer by paying the market price when demanded, or by returning other grain of the same kind and quality, there is no bailment, but a sale or exchange, and the title of the property and the risk are transferred to him.

To determine who shall bear the risk and enjoy dominion over grain which has been by common consent mixed and mingled with that belonging to other parties, we must therefore have recourse to the nature of the transaction, for the rights and liabilities go according to the legal title. "If the nature of the bargain be such," says Mr. Schouler, "as to make the several proprietors owners in common of the mass, any loss should be borne by them in proportion to their several interests; and such an ownership, we have said, is usually presumed. But if one throws his goods into the common mass, on the understanding that the party receiving them may take from the mass at pleasure and appropriate to himself on the condition that he shall restore other goods of the same sort in their stead—and so, too, in stipulations for pecuniary compensation—the dominion over the property passes to the receiver; and on this principle are some of our grain cases decided; the party owning the elevator or warehouse being treated as a purchaser, and not as a depositary." 2 Schouler, Per. Property, § 46. This is the doctrine applied by this court in State v. Stockman, 30 Or. 36, 46 Pac. 851, and finds support in the authorities generally. 3 Am. Law. Reg. (N. S.) 321; 6 Am. Law. Reg. 455; Richardson v. Olmstead, 74 Ill. 213; Lyon v. Lenon, 106 Ind. 567, 7 N. E. 311; Barnes v. McCrea, 75 Iowa, 267, 39 N. W. 392, 9 Am. St. Rep. 473; Weiland v. Sunwall, 63 Minn. 320, 65 N. W. 628; O'Neal v. Stone, 79 Mo. App. 279; Andrews v. Richmond, 34 Hun (N. Y.) 20; Chase v. Washburn, 1 Ohio St. 244, 59 Am. Dec. 623; Rahilly v. Wilson, 3 Dillon, 420, Fed. Cas. No. 11,532; Insurance Co. v. Randall, L. R. 3 P. C. 101.

In Chase v. Washburn, supra, which is probably the earliest leading case on the subject, the warehouse receipts were in the following form: "Milan, Ohio, Nov. 5, 1847. Received in store from J. C. Washburn (by son) the following articles, to wit: Thirty bushels of wheat. H. Chase & Co." In an action of assumpsit to recover the value of the wheat, Chase offered to show that his warehouse and sufficient wheat therein to cover all

the outstanding receipts had been consumed by fire; that the custom of the warehouse was to store the wheat in a common mass and ship the same as occasion required, and, on presentation of a receipt, to pay either the highest market price of grain of like grade and quality or deliver other wheat. The court held that if, when Washburn's wheat was delivered to Chase, it became subject to his disposal either to retain or ship on his own account, the property passed and the risk of loss by accident followed dominion over it; that the transaction would not be a bailment, but the legal effect would be to create a debt which could be discharged by the warehouseman paying in wheat of like grade and amount or in money at the market price at the time of the presentation of the receipt; and that in either case the title to the wheat passed to the warehouseman, and he must bear the loss.

In O'Neal v. Stone, supra, Stone owned and operated a flouring mill having in connection therewith an elevator. All wheat purchased to be ground and such as was received by him on deposit was mixed and commingled in the elevator, and the general bulk was drawn upon to supply the mill when in operation. The elevator and contents were destroyed by fire, after which Stone denied all liability under any of the receipts issued by him and outstanding. The wheat receipt stated that the party to whom it was issued had deposited with Stone a certain quantity of wheat of a certain grade and quality, for which he agreed to pay a certain rate per bushel for storage, and to assume all damage by fire, etc. The wheat was to be delivered to the party at the warehouse on demand, less a certain amount for shrinkage, and should Stone at the time of such demand not have the amount of wheat called for of equal grade and amount as that received, then he was to have the privilege of substituting an amount equal in value of a grade next above or below that received, and he was also to have the privilege of buying the wheat at the market price at the time of the demand. The court held the transaction to be a sale and not a bailment and that the loss must be borne by the warehouseman, adopting the distinction between a sale and a bailment as pointed out by Sir William Jones in his Law of Bailment, in this wise: "If the goods delivered are to be returned, although in a changed form, it is a bailment, but if the intention is that either money or

goods are to be received in exchange for them, there is a transmutation of property, and the obligation created is a debt and not a bailment." Jones, Bailments, § 105. And, in discussing the question, Bland, P. J., said: "The term 'bailment' implies that the owner of property has placed it in the hands of another who is at some time to redeliver it to the owner in its integrity or in an altered form agreed upon. If, therefore, the person to whom the property is delivered has the option to pay for it in money or in some other property or to restore it, such option is inconsistent with the character of bailment and the transaction is, in law, a sale, regardless of what the parties to the transaction may have called it or thought it to be."

In Rahilly v. Wilson, supra, a warehouseman issued a receipt in the following form: "Received in store of P. H. Rahilly * * * bushels of No. * * * wheat. Geo. Atkinson & Co." The litigation was between depositors of wheat receiving such receipts and the trustee in bankruptcy of the insolvent firm, and the court, Dillon, C. J., held that "where grain is stored in an elevator warehouse with the understanding, implied from the known and invariable course of business, that it may be sold by the warehouseman, and that when the depositor shall be ready to surrender the receipt of the warehouseman therefor, the latter will give the highest market price or the same amount of grain of like quality, but not the identical grain deposited, nor grain from any specific mass, the transaction is a sale, and not a bailment."

In Andrews v. Richmond, supra, the plaintiff delivered to the defendants, who were millers, wheat and took back a receipt as follows: "Canandaigua, November 14, 1878. Received of Harris Andrews 490 bushels of wheat in store. The same is subject to him or option to take price on or before the first of May next. Richmond & Smith." The wheat was placed by Richmond & Smith in a bin containing some two or three hundred bushels of the same kind and quality of which they were the owners and from which they were drawing every day for the purpose of grinding, and when they received the wheat from the plaintiff they informed him that they intended to mix it with their own and manufacture it into flour. The mill was burned without the fault of the defendants. During all the time and up to the time of the fire there was more wheat on storage in the bins than was

delivered by the plaintiff. After the fire plaintiff informed the defendants that he had elected to sell the wheat to them at the then market price. In an action brought to recover such price, it was held that if the receipt alone was considered, the contract was one of bailment, but if it was agreed verbally, at the time the wheat was delivered, that it might be mixed by the defendants with their own wheat and be ground into flour at their pleasure, the transaction was, in law, a sale, and the title passed to defendants, who became liable to the plaintiff to pay him the market price of the wheat delivered or to return other wheat of the same grade and quality, as plaintiff might elect, and that plaintiff was entitled to recover. In the course of the opinion it is said: "The mere consent of the plaintiff that his wheat might be mixed with the wheat of the defendants of the same kind and quality was not inconsistent with a bailment simpliciter. Owners of the same kind of property and of equal value, like cereal grains or wines, may consent that they be mixed together in mass, and each, in law, will retain title to his aliquot part, and may maintain replevin for his share as against a wrongdoer who acquires possession of the same. By force of this rule the owner of grain in store may sell a certain quantity of the same, less than the whole, and pass title thereto, without separating the part so sold from the whole." But "an agreement that the particular article which the owner places in the hands of another may be by him consumed or sold in the course of trade is utterly inconsistent with the principles on which the law of bailment is founded. The very term 'bailment' implies that the owner of an article has placed it in the hands of another, who is at some time to redeliver the same to the owner. If the owner consents that the person to whom he delivers the thing may consume or destroy it, it is not a bailment, whatever else the transaction may be in the law."

From these decisions and the principles announced in them, it seems incontrovertible that, under the facts as disclosed by the record, the contract and agreement between the plaintiff and his assignors and the defendant, under which the wheat in question was delivered and received, cannot be construed to be a mere bailment, but it was, in law, a sale or exchange, and the liability for loss by fire was with the defendant. The wheat was not received by defendant to be stored for safe-keeping

until called for by the owner, nor was it delivered with the understanding that it or other wheat of the same grade and quality from the common mass was to be returned. By consent of all parties it was mixed with and became a part of the consumable stock of the mill, and the defendant had a right to and did make such use of it as it saw fit, being liable to pay therefor, when demanded, either in money at the market price of grain of like grade and quality, or in other wheat of the same grade and quality. The effect of the transaction was, therefore, to create a debt from the defendant to the depositors, which it could pay either in money or in kind. The provisions in the wheat receipts as issued by the defendant, "damages by the elements excepted," and for the payment of storage charges and sacks, did not vary the nature of the transaction or change what would otherwise be a sale or exchange into a mere bailment. The contract must be ascertained from the general course of dealing and the entire transaction, and not from a single provision or provisions which defendant has seen proper to include in its wheat receipts. It cannot, by inserting into its receipt some clause or clauses which, standing alone, are inconsistent with a sale, change the entire nature of the transaction, and make a bailment out of what, in law and in fact, was a sale or exchange.

We are cited to a number of cases which are supposed to support the defendant's argument that, although the identical wheat delivered was consumed by defendant, the case is nevertheless one of bailment, as there was all the time wheat in the mill and warehouse or elsewhere in the state, belonging to the defendant, equal in amount to that delivered and of the same grade and quality. Moses v. Teetors, 64 Kan. 149, 67 Pac. 526, 57 L. R. A. 267; National Bank v. Langan, 28 Ill. App. 401; McGrew v. Thayer, 24 Ind. App. 578, 57 N. E. 262; State v. Rieger, 59 Minn. 154, 60 N. W. 1087. State v. Rieger, supra, was under a special statute, and the other cases cited were those of warehousemen who did not have the right to use the grain stored with them as a part of their consumable stocks and for their own use and benefit.

We conclude, therefore, that for the reasons given the judgment of the lower court was right, and must be affirmed. There is, however, another view of the case which is worthy of con-

sideration, although not specially relied upon by plaintiff. It appears from the answer of defendant, as we understand it, that prior to the fire it had used or shipped from the warehouse and mill a part of the wheat which it claims was stored with it, and, at the time, there was a shortage of about 17,000 bushels. It, therefore, did not have on hand wheat sufficient to satisfy in full the claims of the parties who had deposited wheat with it. If the original contract was a mere bailment with the right in the defendant to ship or use the wheat deposited, there are authorities holding that the character of the transaction and the relation of the parties were changed when any part of the wheat was so used or shipped, and it could thereafter, at the election of the bailor, be treated as a completed sale. Cloke v. Shafroth, 137 Ill. 393, 27 N. E. 702; Nelson v. Brown, 44 Iowa, 455; Bucher v. Commonwealth, 103 Pa. 528.

The judgment of the court below will be affirmed.

ON REHEARING.

There is no finding that it was specifically agreed that the defendant should have the option to pay for the wheat in controversy either in money or in kind. The court, however, in its findings sets out in detail the facts constituting the contract between the parties, from which it conclusively appears that neither the wheat delivered by the plaintiff and his assignors nor wheat from the common mass into which it was put was to be returned, but that the wheat was to be mixed with and become a part of the consumable stock of the mill, to be sold and disposed of by the defendant on its own account. Findings 4 and 5, in substance, are that at the time the wheat was delivered and received, it was the custom and usual course of business of the defendant, known to and acted upon by persons dealing with it, for it to mix all wheat delivered with that belonging to it in one common mass; the first refusal of such wheat being reserved by and conceded to the defendant; and thereafter, "at its own convenience and pleasure" and "without any written authority," to "ship out any of such common mass * * * or grind the same into flour and other mill products and the same to sell for the account and benefit of the defendant," and, generally, in settlement of the claims arising out of such delivery to "pay by bank check or in money

to the person delivering the wheat the market value at Salem, Or., on the day of settlement, of merchantable wheat of the quantity delivered, less warehouse charges," although, in some instances, settlements were made by delivery of wheat equal in quality and quantity to that received. * * * The custom and general course of business, therefore, entered into and became a part of the contract between them, and the legal effect of the transaction is that the wheat was delivered and received under an agreement that it should be mixed with wheat belonging to the defendant and that the latter could, at its own convenience and pleasure, and without any further authority from the persons delivering it, sell and dispose of the wheat or grind it into flour and other mill products and sell the same for its own account and benefit; and this, as we have endeavored to point out, constitutes a sale, and not a bailment. The fact that there was no special or distinct agreement that defendant should have the option to pay for the wheat either in money or in kind is unimportant. If, as the findings show, neither the wheat delivered nor wheat from the common mass with which it was mixed was to be returned to the farmers, but it was understood that it should become a part of the consumable stock of the mill to be sold and disposed of by the defendant as its own, it necessarily follows that the title passed. The defendant could only discharge its obligation by paying for the wheat in some way, and whether it was required to make such payment in money, or had the option to pay in money or in kind, cannot change the legal effect of the transaction.

The petition for rehearing is therefore denied.

CHAPTER XI.

RESPECTIVE PROPERTY RIGHTS AND INTERESTS OF BAILOR AND BAILEE.

Property Rights of Bailee as Against Strangers—Right to Recover Full Value for Conversion.

GUTTNER et al. v. PACIFIC STEAM WHALING CO.

96 Fed. 617. 1899.

DE HAVEN, D. J. This is an action for a marine trespass and conversion. The libel charges that in the month of October, 1897, one Leavitt, master of the whaling bark Newport, owned by the defendant, took by force from the bark Navarch, then on the high seas, certain provisions, ship's gear, whaling gear, tools, and other articles of which the libelants were then lawfully possessed as of their own property. The defendant, in its answer, admits the taking of certain provisions at the time and place stated in the libel, but denies that the libelants, or any of them, were lawfully possessed of the property so taken, and also puts in issue the allegation of the libel that any provisions, stores, or other articles of personal property were taken by force and against the will and consent of the libelants; and for a separate defense it is alleged that it was necessary for the master of the bark Newport to take the provisions mentioned in the libel for the use of the crews of the Newport and other whaling vessels ice-bound in the Arctic Ocean at that time, and for the preservation of human life.

1. The facts of the case may be very briefly stated as follows: The libelants were seamen on board the steam whaling bark Navarch, and on August 5, 1897, that vessel was ice-bound in the Arctic Ocean, and, though staunch and strong, was then abandoned by her master and all of her crew, it being thought that she was in the Northwest current, and such action necessary for the safety of those on board. They were unable to make land, and, after being five days upon the ice, returned

to the ship, and there remained four days, when her master and all of the crew except the libelants and three other persons again abandoned her, and started for the United States steamer Bear, then in sight, and only a few miles distant. The libelants refused to leave the Navarch at this time, for the reason that in their opinion it was more dangerous to go upon the ice than to remain; and it is possible they may have thought, or some of them, at least, that, if the vessel was finally saved, they would be entitled to compensation as salvors if they continued with her. None of them, however, knew anything about navigation, nor were they ever called upon to exercise any skill as navigators, as the Navarch drifted with the ice until the latter part of September, when she was sighted about 12 miles from Point Tangent by the Newport and the Fearless. These last-named vessels were lying ice-bound in a position of safety, about one-quarter of a mile from shore, and out of the current. They were only provisioned for six weeks, and therefore in need of additional supplies to subsist their crews until they could be released from the ice the following summer; and when the Navarch was sighted an officer from each, and a number of natives with sleds, were at once sent out to her, for the purpose of obtaining such stores and provisions as could be spared, and also to assist her crew in coming to the vessels in shore, if they desired so to do. This party succeeded in reaching the Navarch, and the sleds were, with the consent of the libelants, loaded with supplies, all of which were lost upon the return trip on the ice; and the masters of the Newport and Fearless then determined to bring in all of the stores remaining upon the Navarch. This action was deemed necessary by them, because their vessels did not have sufficient provisions for the winter, and also because the Navarch was in a position of extreme peril and already abandoned by her master and most of the crew. In order to bring in the provisions, it was necessary to secure the assistance of natives with their sleds, and, for the purpose of inducing them to assist in this work, the natives were told that they might keep for themselves all of the whaling gear, sails, and tools which they might save from the Navarch. This was satisfactory to them; and under the direction of two officers, one from the Newport and one from the Fearless, they proceeded with sleds to the Navarch, and brought in all of her provisions, some

whaling gear, a number of sails, and other articles. The provisions were placed on board the Newport, and less than one-half was retained by Capt. Leavitt for the use of that vessel, and the remainder divided between the Fearless and the steamer Jennie. The other articles were taken by the natives, with the exception of one hawser and two lengths of hose, which were retained on the Newport, and a steam pump and two sails, purchased by the master of the Fearless from one of the crew of the Navarch, who is not a libelant. The provisions divided between the Newport, Fearless, and Jennie were of the value of $871, and it is claimed by the libelants that the whaling gear and other articles kept by the natives were of the value of $2,900, or thereabouts. Whether this property was taken from the Navarch with the consent of the libelants will be considered in another part of this opinion.

2. It will be seen from the facts stated that the stores and other property taken from the Navarch belonged to the owners of that vessel. The libelants were, however, in lawful possession of the property at the time it was taken, and had the right to so continue as against every one except the true owner. The possession thus had was not the possession of servants, merely, and is sufficient to entitle the libelants to maintain this action as against the defendant, who has not shown a better title, if, in fact, the property was taken from them against their will and consent. Jefferies v. Railway Co., 5 El. & Bl. 802; Wheeler v. Lawson, 103 N. Y. 40, 8 N. E. 360; Stowell v. Otis, 71 N. Y. 36. In the case last cited it was said: "The peace and good order of society require that persons thus in possession of property, even without any title, should be enabled to protect such possession by appropriate remedies against mere naked wrong-doers." As already stated, the present case falls within this rule, if the property mentioned in the libel was taken by the master of the Newport from the libelants against their consent. Upon this question of fact the evidence is sharply conflicting, and it is not deemed necessary to attempt in this opinion any analysis of the testimony of the different witnesses, or to do more than state the conclusion reached upon this point. I think it sufficiently appears from the evidence that the libelants were not willing to let the stores on the Navarch be taken from their possession, except upon condition of receiving a written

or their successors, to any part of the judgment to be recovered in this action, is a question not before the court at this time.

The measure of damages for the trespass and conversion complained of here is the same as that upon which courts act in awarding damages in common-law actions of trespass or trover, when property has been taken from the lawful possession of a plaintiff by one who is unable to show a better title; and under that rule the libelants are entitled to recover the full value of the property converted by the defendant. 1 Suth. Dam. 210; Armory v. Delamirie, 1 Strange, 505, 1 Smith, Lead. Cas. 636; Russell v. Butterfield, 21 Wend. 300; Harker v. Dement, 9 Gill, 7. This is the doctrine of the leading case of Armory v. Delamirie, just cited, in which it was held that the finder of a jewel was entitled to recover its full value in an action of trover against one who had taken it for examination, and refused to return it. It is not perceived that there is anything inequitable in this rule, or in its application to the present case, as the satisfaction of the decree herein will be a bar to another action by the true owner for the same conversion (Chesley v. St. Clair, 1 N. H. 189; Bissell v. Huntington, 2 N. H. 143; Bac. Abr. Tit. "Trover," par. 33); so that the defendant will only be required to pay the value of the property which it has converted, and, as a necessary result of giving such an effect to the decree, the libelants will be accountable to the owners of the Navarch for all that may be recovered in this action over and above the value of their own special interest, if any they have; and it will be provided in the decree that the money to satisfy the same shall be paid into court, so that the owners of the Navarch, or their successors in interest, may intervene in this proceeding for the protection of their rights at any time before the amount which the defendant is required to pay shall come into the hands of the libelants. If they do not choose to intervene, and are satisfied to allow the libelants to retain for their own use the amount recovered in this action, that is a matter which does not concern the defendant, and of which it has no right to complain. What, then, should be the extent of the recovery against defendant upon the facts of this case? In my opinion, the libelants are entitled to recover the value of so much of the property tortiously taken by the defendant's agent, Capt. Leavitt, as was appropriated to the use and benefit

of the Newport (The Florence, 2 Flip. 56, Fed. Cas. No. 4,880), and no greater sum. The defendant is only liable for the tort of the master of the Newport in so far as he was engaged in accomplishing a purpose within the general scope of his employment, and he was not clothed by the defendant with authority to secure whaling gear and other property for the natives, nor supplies for any other vessel than the one of which he was master. * * * I find the value of the property taken for the use of the defendant to be $450. Let a decree be entered in favor of the libelants for this sum and costs, the money to satisfy the decree to be paid into court.

Reversionary Right of Bailor—Right of Action of Bailor for Permanent Injury to Chattel, in Spite of Contributory Negligence of Bailee.

NEW YORK, L. E. & W. R. R. CO. v. NEW JERSEY ELECTRIC RY. CO.

60 N. J. L. 338, 38 Atl. 828. 1897.

Cortlandt and R. Wayne Parker, for plaintiff. William B. Gourley, for defendant.

LIPPINCOTT, J. In this case the action is brought by the New York, Lake Erie & Western Railroad Company, by its receiver, against the defendant, to recover damages sustained by the locomotive engine and cars of the plaintiff, in a collision between the locomotive engine and an electric car of the defendant company, at a crossing, over a public highway, at Singac, in Passaic County, on September 2, 1895. The locomotive and some of the cars of the train belonged to the plaintiff company, and by it had been hired by the day, and from day to day for use, to the New York & Greenwood Lake Railway Company, which latter company was, with its own engineer, fireman, and employes, running the same over and upon its own roadbed and rails, at such highway crossing, at the time and place of collision. The defendant was a street electric railway company, running along and upon the Little Falls road, which is a public highway from Paterson to Passaic and Rutherford. The tracks of the New York & Greenwood Lake Railway cross this highway at

Singac. At the same point, the electric car tracks of the defendant company cross the tracks of the plaintiff railroad company; and the collision between the electric car and the locomotive, while both were in the act of making this crossing, caused the damage to the locomotive and cars of the plaintiff. The cause was tried at the Passaic circuit, together with the case of the New York & Greenwood Lake Railway Company against the defendant, for damage to the tracks of the railroad, and to other cars owned by it, before the same jury, and the evidence is the same as to both cases except as to damages. Both cases were argued in this court at the November term, 1896,—the former case upon a rule to show cause why the verdict, which was for the defendant in that case, should not be set aside, which rule was discharged at the February term, 1897, upon an opinion of the court rendered at that term. 37 Atl. 628. In that case, this court, in its opinion, held that there existed no error of the trial court in the admission or rejection of evidence, or in its instruction to the jury, nor was the verdict against the evidence or the weight thereof, nor contrary to the charge of the court. In the cause now in hand the trial justice directed the jury to return a special verdict. The jury were directed to find by their verdict—First, whether the collision or accident occurred by reason of the negligence of the employes of the defendant in charge of and operating the electric car of the defendant company; secondly, whether the negligence of the employes of the New York & Greenwood Lake Railway Company, the bailee of the plaintiff company of the locomotive and some of the cars of the train, contributed to the collision or accident; and, thirdly, what amount of damages had the plaintiff suffered. The jury, by their special verdict, found negligence of the employes of the defendant company causing the accident; also that the negligence of the employes of the New York & Greenwood Lake Railway Company contributed thereto; and also that the plaintiff company had suffered damage to the amount of $1,445. On this verdict the postea was framed, and the motion now is for judgment thereon.

The right of the plaintiff to recover against the defendant is denied on the ground, first, that, under the verdict finding that the contributory negligence of the New York & Greenwood Lake Railway Company concurred and coöperated with the neg-

ligence of the defendant in causing the injury, that therefore the action should be alone against that company, and that for such injury action only can be had against the New York & Greenwood Lake Railway Company, which was the bailee of the plaintiff of the locomotive and cars, and that it cannot be maintained against the defendant, although its negligence contributed to the injury. This contention involves the question of the right of the bailor against a third party as wrongdoer in relation to the subject-matter of a bailment for hire for use. There is no question but that, for the injury to the actual possession of the bailee, action against a third party will lie only at the suit of the bailee; and the general current of authority appears to be that the bailee can include in such suit damages for the entire injury to the subject of the bailment, but no case is found which denies the right of the bailor to sue and recover for the permanent injury to the property even before the expiration of the bailment. One who has a fixed reversionary interest in property has a right to sue one who is not in possession thereof for an injury to such property which will depreciate its value when it comes to his hands, and is entitled to recover damages to the extent of such depreciation. The owner of a reversionary interest in personal property has the same right of action for an injury thereto as in the case of real property. Shear. & R. Neg. § 119. The bailor, when he makes a bailment for hire, parts with the right of possession to the chattel; and it has been held that he cannot during the existence of the bailment maintain an action of trespass for its asportation, or trover for its mere conversion, or replevin to recover back its possession against any third person; but it seems to be the accepted doctrine at present that, if any permanent injury be done to the chattel, he may maintain a special action on the case against a third party for injury done by such third party to the reversionary interest, and this seems to be both by reason and authority the rule, whether an action might or might not be maintained by the bailee against such party for trover, trespass, or replevin, to control the immediate possession. Pol. Torts, p. 432. A person who has let a chattel out to hire may, nevertheless, sue a third party for damages in respect to the permanent injury to the reversionary interest. Add. Torts, p. 410. In Mears v. Railway Co., 11 C. B. (N. S.) 850,

the case was that a barge was let to hire. The defendant, who was not the bailee, was engaged in raising a boiler out of the barge, when the boiler was negligently allowed to fall, destroying the barge. The court held that the plaintiff, who was the owner of the barge, had the right to sue a third party whose negligence caused the injury, and laid down the rule that, although the owner could not bring an action when there had been no permanent injury to the chattel, where there is such permanent injury the owner might maintain an action against the person whose wrongful act had caused the injury. The general rule appears to be that the owner of a chattel which is out on hire for an unexpired term may maintain an action against a third person for a permanent injury thereto. This seems to be the rule whether the bailment has expired or not. Howard v. Farr, 18 N. H. 457; White v. Griffin, 49 N. C. 139; Railroad Co. v. Kidd, 7 Dana, 245; Hawkins v. Phythian, 8 B. Mon. 515. A bailor need not look alone to his bailee for a wrong by a third party in connection with the bailee, as respects the contract of bailment. If a bailee assumes to pledge or sell the bailed goods as his own, such an act amounts to a conversion, and the bailor may immediately bring an action of trover or replevin against the third party in whose possession the property is found. Story, Bailm. (9th Ed.) § 413. In Enos v. Cole, 53 Wis. 235, 10 N. W. 377, the right of the action of trespass against a third party to whom the bailee had improperly sold the goods bailed was distinctly recognized. Whether the bailment in the case in hand had expired or not, it seems, can make very little difference. This bailment or hire of this locomotive and cars was presumably by the bailor at its will. A bailment may be determined by the mere efflux of time, as where the chattel is bailed for a stated period. Here the bailment was not for any stated period. It may be determined by the accomplishment of the object for which the thing was bailed, as where the chattel is hired for a particular purpose, or is pledged until the loan is repaid. It may be dissolved by mutual agreement at any time. And either party, as has been said, where the bailment is not for any particular time, may terminate it at will. It may be determined by the total or partial destruction of the subject-matter of the bailment, as where a chattel is lost or is destroyed. It may be also terminated where the bailee disposes of it con-

trary to the terms of the bailment. In this case the bailment was terminated at the time of the injury, for then it was no longer, under the evidence, fit and suitable for the use which the contract of bailment contemplated. While a mere misuse might not terminate the bailment, yet, when, by the negligence of the bailee either alone or in conjunction with the negligence of a third party, it is no longer fit and suitable for the uses for which it was hired, both by reason and all the authorities, the contract of bailment is at an end. It would seem to be clear that, under general principles, a bailor can maintain an action for injury to the property bailed, at the hands of a third party, who is a wrongdoer in relation thereto, especially wherever the injury is of a permanent character. Therefore the contention of the defendant that the right of action was alone against the bailee must fail.

But the right to recover is secondly denied upon the ground that the contributory negligence of the New York & Greenwood Lake Railroad Company, the bailee of the locomotive and cars, is a bar to recovery by the plaintiff company, which was the bailor of the same, and that the contributory negligence of the bailee is imputable to the plaintiff as bailor, and therefore prevents a recovery. It is contended that, in law, the bailee could have included the injuries to the locomotive and cars in his action against the defendant, and that its contributory negligence would have been a complete defense to the action, and, this being so, that this same contributory negligence can be successfully set up against the plaintiff, who is the owner of the property; or, in other words, that the possession by the bailee involves the bailor in all the consequences of the default of the bailee, however much the act of wrongdoing by the third party might be the joint cause of injury to the chattels in the possession of the bailee. The reason of this contention, as it appears to the court, is not apparent or well founded. It need only be said that a bailment is a contract which is interpreted by the same rules as other contracts. The bailor and bailee are just as independent of each other in regard to the subject-matter as the contract by its terms permits them to be. It is the delivery of a thing in trust for some special object or purpose, upon a contract, express or implied, to conform to the object or purpose of the trust. Story, Bailm. (8th Ed.) 4. This is evidently

true as to a bailment for hire to use—locatio rei. If not a part of the express contract, the law impliedly engages to allow the full use and enjoyment of the chattel by the bailee, to the extent of the use and enjoyment of the object of the hiring, and for the time hired. This right of the bailee is quite independent of any control by the bailor, but there is also the right of the bailor to have the thing used with care and moderation; to have it applied to the use for which it is hired, and no other; to have it used with reasonable care for its preservation; and to have redelivery when the use to which it is to be devoted is completed or performed, or the bailment has otherwise expired. The bailee is responsible to the bailor for injuries to the subject of the bailment by reason of the negligence of the bailee, and of his servants in the course of his employment, occasioning injury to the property. The general property remains in the bailor, and the bailee only has a special interest for the express or implied objects of the bailment. Under these general principles, now well established as governing the contract of bailment, it would be entirely too artificial to say that no right of action existed by the bailor against a third party as a wrongdoer for injury by negligence or otherwise to the chattel which was the subject of the bailment. It is not an answer that the bailee has his right of action for the full injury against the wrongdoer, for the bailee may never choose to seek such a remedy, nor can he be compelled to do so, nor can it be said with any greater reason that the bailor must resort alone to the bailee for redress for the injury, for it may have occurred in spite of the exercise of the full degree of care required of the bailee, as in case of theft by the servants of the hirer, for which he is not, generally speaking, liable, unless there are some circumstances which impute to him a want of due diligence. Vere v. Smith, 1 Vent. 121, 2 Lev. 5; Story, Bailm. (8th Ed.) §§ 38, 407. The servants of the bailee are responsible to the bailor for their malfeasance, not because they are the servants of the bailee, but because they are active wrongdoers to the bailment. Lane v. Cotton, 12 Mod. 488; Story, Bailm. (8th Ed.) § 405; Story, Ag. §§ 309-320. The care or diligence required to be exercised depends upon the nature of the subject, and it rises in proportion to the demand for it; and, when the required care is exercised, the bailee is no longer responsible to the bailor. There-

fore, there is nothing in the relation of the bailor and bailee which of itself can prevent the bailor from seeking out the third party as the wrongdoer, and imposing upon him the liability for the results of his conduct to the subject of the bailment. It would seem, upon reason, that there could exist no objection to the joint liability of the wrongdoer and the bailee when the joint negligent act of both caused the injury.

But the defendant distinctly contends that the negligence of the bailee or its servants in the operation of this locomotive and train of cars by reason of this bailment, contributing to the injury, is imputable to the bailor, and prevents a recovery on the part of the bailor against the defendant, as a third party who is a joint wrongdoer with the bailee. This joint negligence by the special verdict is found to have been the cause of the collision and injury, and therefore the case must be considered with the fact of the contributing negligence of the bailee established. In a contract of bailment of things for hire, the bailor is not responsible to a third party for injuries occurring to such third party by reason of the negligent use of the thing hired by the bailee, nor for the negligence of the servants of the bailee in respect thereto. The bailee does not stand in the place of the bailor, nor represent him in such relation as to render the bailor liable for such injuries; nor are the servants of the bailee the servants of the bailor, or in any sense acting for him; and the contract of bailment is in so far entirely an independent one, and the liabilities of the bailor and bailee to third parties are essentially independent of each other. In this case it cannot be contended that the plaintiff company would have been responsible to the defendant if the negligent use of the locomotive by the servants of the New York & Greenwood Lake Railway had occasioned an injury to the defendant's car at this crossing. This negligence, however much it might be the occasion of the injury to the defendant, could not have rendered the plaintiff company responsible, so long as in this case no act or conduct of the plaintiff company was in question. It did not in fact advise, encourage, or permit in the hands of its bailee the negligent use of this locomotive. The contributory negligence of a third person can only be set up in defense when it is legally imputed to the plaintiff, and its existence must depend upon some connection or relation between the

plaintiff and the third person from which such legal responsibility may arise. It is a general rule that it is no justification of the misconduct of the defendant that some third person, a stranger, was also in the wrong. The negligence of the servant in the course of his master's employment is imputable to the master, and so as between agent and principal. But the negligence of one passenger in a car standing alone, inflicting injury upon another passenger, is not imputable to the railroad company, a common carrier of passengers. There must exist concurring negligence in some respect in the railroad company. Sheridan v. Railroad Co., 36 N. Y. 39; Cannon v. Railroad Co., 6 L. R. Ir. 199. If the defendant be negligent, the fact that the negligence of others coöperated or concurred with it in effecting the wrong does not affect the question or measure of liability. Mott v. Railroad Co., 8 Bosw. 345; Atkinson v. Transportation Co., 60 Wis. 141, 18 N. W. 764.

It may be deemed to be settled in this state that the employes or servants of a bailee are not the servants of the bailor in any such relation as to make the bailor liable to third parties for their negligence or misconduct in relation to the thing bailed; as where A. hired a coach and horses with a driver from B., to take his family on a particular journey, and in the course of the journey, in crossing the track of a railroad, the coach was struck by a passing train, and A. was injured. In an action by A. against the railroad company for damages, it was held that the relation of master and servant did not exist between the plaintiff and the driver, and that the negligence of the driver, coöperating with that of the persons in charge of the train which caused the accident, was not imputable to the plaintiff as contributory negligence to bar his action. It was further held that for whatever purpose the negligence was invoked, whether as an action for injury done by the driver, or as contributory negligence to bar the action by the passenger against the third person for an injury sustained, the negligence to be imputed to the passenger must be such as arises in some manner from his own conduct. The negligence of the driver without some coöperating negligence cannot be imputed to the passenger in virtue of the simple act of hiring. Railroad Co. v. Steinbrenner, 47 N. J. Law, 161; Bennett v. Transportation Co., 36 N. J. Law, 225. There is no perceivable distinction

between the case in hand and the cases last cited. Both rest upon a contract of bailment for the hire of a thing for use, and, although a contract mutually beneficial to each of the parties, they are so independent of each other that the negligence of one cannot be imputable to the other. It is only when the contributory negligence is of such a character, and the third person is so connected with the plaintiff that an action might be maintained against the plaintiff for damages for the consequences of such negligence, and when the plaintiff brings the action, that the negligence is, in contemplation of law, the plaintiff's negligence, and it is justly imputed to him. This relation does not exist between the bailor and bailee under the ordinary contract of bailment. The case of Hawkins v. Phythian, 8 B. Mon. 515, is a case very similar in the application of the principles of law to the one in hand. In this case the plaintiff hired a slave to A., who allowed him to go with B. While B. had the slave, he put him on a restive horse, which threw the slave, and killed him. The plaintiff sued A. and B. together. The verdict was allowed to stand against B., although it was set aside as to A., by reason of an erroneous instruction of the court to the jury. The cases cited by the defendant in his argument are mainly based on the doctrine laid down in Thorogood v. Bryan, 8 C. B. 114, in which the deceased intestate, while alighting from the omnibus in which he was a passenger, was knocked down by the defendant's omnibus, and received injuries from which death ensued. The court held in that case that, if the want of care on the part of the driver of the omnibus in which the deceased was riding, in not driving up to the curb to put the deceased down, had been conducive to the injury, the plaintiff could not recover, although the defendant's driver had been guilty of negligence. It is sufficient to say that this doctrine has been thoroughly disapproved in this state in the case of Railroad Co. v. Steinbrenner, 47 N. J. Law, 161. Before the Steinbrenner case had been decided, Chief Justice Beasley, in the case of Bennett v. Transportation Co., 36 N. J. Law, 225, had repudiated the doctrine. It has now been overruled in England in the Bernina case, 12 Prob. Div. 58. The Supreme Court of the United States, in the case of Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. 391, also repudiates it. There is a line of cases in which the peculiar relation of the shipper of

goods, and the common carrier thereof, exists, locatio operis mercium vehendarum, where the common carrier only can be held responsible for an injury to the goods. In this relation the common carrier, and not a third party as a wrongdoer to the goods, is alone responsible for all injuries, save those caused by the act of God or the public enemy, or for the natural wear and tear; and for injuries arising from these latter causes no one can be made liable. The shipper, according to such authorities, cannot recover against a third party for negligence in the care of such goods or injuries to them. The distinction between the relation which exists in law between the shipper and the common carrier of goods and the bailment for hire of a chattel for use is so obvious as not to need discussion. The carriage of goods is by all legal writers classed as a different contract of bailment, having peculiarities and governed by principles characteristic of the relation quite apart from the contract of bailment of chattels for hire. The cases cited by the defendant are Vanderplank v. Miller, 1 Moody & M. 169; Simpson v. Hand, 6 Whart. 311; Transfer Co. v. Kelly, 36 Ohio St. 86; and Insurance Co. v. Austin, 69 N. Y. 470. These cases are all cases which arise under the contract of bailment for the carriage of goods and chattels, not by a special, but by a common, carrier. He is treated as an insurer against all but the excepted perils (Jones, Bailm. 101), and the shipper cannot look beyond him for liability; and this rule is said to be grounded upon public policy.

I cannot perceive that whether, in respect to this action, the duty of the defendant and the bailee were joint or separate can make any difference. If the same duty of care was due and owing to the plaintiff, then a common neglect of that duty would render them both liable as joint tort feasors. If the duty to plaintiff was a separate one, which was neglected to be performed by each of them, although the duties were diverse and disconnected, and the negligence of each was without concert, if such neglects concurred and united in causing the injury, the tort still is equally joint, and the tort feasors are subject to a like liability. Matthews v. Railroad Co., 56 N. J. Law, 34, 27 Atl. 919. The bailee was bound to use reasonable care and diligence in the preservation of the property from injury. The defendant, in the operation of the electric car, was bound to

exercise reasonable care in avoiding injury to the property of which the plaintiff was the owner. It would seem that the intervention of the negligence of the bailee could not shield the defendant from the injury caused by its own negligence. Both might have been selected as joint tort feasors, or the action could be maintained against either. The conclusion reached is that the plaintiff had the right to sue either or both these companies for the injuries arising from their negligence to the locomotive and cars of the plaintiff, and it is not a defense to the action that the accident was contributed to by the negligence of the other. Each is liable upon its own negligence.

LEADING ILLUSTRATIVE CASES
LAW OF LIENS AND PLEDGES

CHAPTER II.

COMMON LAW LIENS AND STATUTORY LIENS BASED ON POSSESSION.

The Lien of a Common Carrier.

RUSHFORTH v. HADFIELD.

6 East 519 (Eng.). 1805.

[This was an action of trover to recover the value of a parcel of goods belonging to the bankrupts before their bankruptcy, and sent on their account to be carried by the defendants, common carriers, from Ellen and to London, and which were detained by the defendants after tender of, and refusal by them to accept, the price of the carriage of such goods until a balance of £781 15s. 7d. due to them from the bankrupts for the carriage of other goods at other times was paid. And the question was, whether the defendants, as common carriers, had a lien on the goods for their general balance. At the trial before Graham, B., at the last assizes at York, the defendant's counsel offered evidence to show that by the usage of trade throughout the realm common carriers had a right to retain particular goods belonging to a party for their general balance due from the same party for the carriage of other goods belonging to him.]

On the part of the plaintiffs it was objected, that this evidence did not prove a general usage of the trade; but the learned judge thought that, being uncontradicted, it admitted of that conclusion; and therefore he directed the jury, that if they

found that such was the general undisputed usage, it established the right of the carriers; and they thereupon found a verdict for the defendants; which was moved to be set aside in the last term as a verdict against law and evidence; and a rule nisi was granted.

LORD ELLENBOROUGH, C. J. There was no sufficient evidence on which the jury could find any such general usage as would warrant the conclusion of an agreement between the parties to adopt it. The lien claimed by the carriers for their general balance is not founded in the common law; for by the custom of the realm a common carrier is bound to carry the goods of the subject for a reasonable reward to be therefore paid, by force of which he has a lien only for the carriage price of the particular goods. Then what proof is there of any further lien by usage? I will not say that there may not be sufficient evidence of such a general usage for the carrier to let out of his hands the particular parcel on which his common law lien attaches, without receiving the carriage price of it at the time, upon a general agreement, of which such usage would be evidence, that he may retain any other parcel belonging to the same party for the whole of his demand; but such a general usage ought to be proved by stronger evidence than was offered in this case, especially as it trenches upon the common law right of the subject. But if there be a general usage of trade to deal with common carriers in this way, all persons dealing in the trade are supposed to contract with them upon the footing of the general practice, adopting the general lien into their particular contract. The case, however, does not appear to have gone to the jury on this view of it. There had been previous dealing between these parties, and there might have been evidence to show, if such had been really the case, that it was understood between them that the carriers were to have a lien on any parcel of goods in their hands for the carriage price of those which had been antecedently delivered; but that was not resorted to, but was left to the jury as a case turning on the general usage of carriers throughout the realm to have a lien for their general balance, without any sufficient evidence before them to warrant them in drawing so extensive a conclusion. The oldest instance which could be particularized was not above

five years ago, and but one instance, and that only two years ago, of the exercise of the claim to any considerable amount, so as to make it worth while to resist it. To justify, however, so extensive a claim upon the ground of general usage, there ought to be evidence of instances more ancient, more numerous, and more important.

LAWRENCE, J. I agree that there ought to be a new trial. Common carriers are every day attempting to alter the situation in which they have been placed by the law. At common law they are bound to receive and carry the goods of the subject for a reasonable reward, to take due care of them in their passage, and to deliver them in the same condition as when they were received; but they are not bound to deliver them without being paid for the carriage of the particular article, and therefore they have a lien to that extent. Of late years, however, they have been continually attempting to alter their general character by special notices on the one hand to diminish their liability, and on the other hand by extending their lien. But what evidence have we in this case to say that their common law situation is altered? To do that it must be shown that both parties have consented to the alteration; the carrier cannot alter his situation by his own act alone. It is said that a general lien is convenient to the parties concerned. I do not say that it may not be so, but it must arise out of the contract of the parties. It may be convenient enough for the customer to say, that in consideration that you, the carrier, will give up your right to stop each particular parcel of goods for the price of the carriage, I will agree that you may stop any one parcel of my goods for the carriage price of all together. But still this must be by contract between them; and usage of trade is evidence of such a contract. And where such a usage is general, and has been long established so as to afford a presumption of its being commonly known, it is fair to conclude that the particular parties contracted with reference to it. Then, if in this case there had been evidence of a usage so uniform and frequent as to warrant an inference that the parties contracted with reference to it, it should have been left to the jury to infer that it was part of their contract.

Rule absolute.

The Lien of a Warehouseman.

LOW et al. v. MARTIN.

18 Ill. 286. 1857.

SKINNER, J. This was an action of replevin for a quantity of corn.

[The defendant pleaded property in himself, traversing the averment of the declaration that the corn was the property of the plaintiffs, and a plea setting up his lien, as a common warehouseman, for storage of the corn. To this last plea the plaintiffs replied doubly: First, denying the indebtedness for storage; and, second, that the defendant falsely and fraudulently issued to the plaintiffs divers warehouse receipts, purporting that the defendant, as a common warehouseman, had received and had on store for the plaintiffs certain large quantities of grain, of value exceeding the defendant's claim for storage; and that the plaintiffs were thereby deceived and paid the value of the grain so falsely pretended by the defendant to have been received and to be in store for the plaintiffs. To this last replication the court sustained a demurrer. The cause was tried by a jury, who returned a verdict for the defendant, which the court refused to set aside.]

* * * * * * * * *

The replication to which the demurrer was sustained is no answer to the plea to which it was interposed. We can conceive of no reason or policy why common warehousemen should not have a lien on property stored by them for their proper charges, and the consequent right to retain the possession until paid.

It is true the authorities leave the law in this respect somewhat unsettled, but warehousemen, like common carriers, hold themselves out as publicans (so to speak), ready, to the extent of their ability, to accommodate all in the safe-keeping and forwarding of property according to the course of commerce; and must necessarily look to the property rather than to the responsibility of the owner, of whom they seldom have any knowledge, for their reward. In case, therefore, where delivery of the property to the owner is called for, there would seem to be the same reason and necessity for this lien in favor of warehouse-

men, as of carriers or artisans; and they should stand, in this respect, upon the same footing. Steinman v. Wilkins, 7 Watts & Serg. 466; Story on Bailments, § 543; Angell on Carriers, § 66, and cases there cited.

If the defendant had not performed his contract or duty as bailee, and the plaintiffs were damaged thereby to an amount exceeding what he otherwise would have been entitled to, he could have no just claim for storage and consequently no lien. Edwards v. Todd, 1 Scam. R. 462; Angell on Carriers, § 413. But it does not follow, because the defendant falsely and fraudulently issued to the plaintiffs warehouse receipts for other grain, that he has lost his lien for charges on the grain in controversy, alleged to have been in fact received and stored.

The receipt and storage of the grain replevied, and the falsely issuing receipts for other grain not in fact received, are different transactions; and the latter cannot be set up in avoidance of the lien arising out of the former. Angell on Carriers, § 415.

Judgment affirmed.

The Lien of an Innkeeper.

SINGER MANUFACTURING CO. v. MILLER.

52 Minn. 516, 55 N. W. 56, 38 Am. St. Rep. 568, 21 L. R. A. 229. 1893.

VANDERBURGH, J. The court below found the facts as stipulated by the parties in the agreed statement of facts, as submitted, and, as a legal conclusion, that the plaintiff was entitled to judgment. The defendant claimed an innkeeper's lien upon the chattel in controversy, a sewing machine, on the ground that it was brought to his hotel by a guest, who, it now appears, had contracted to purchase the same of plaintiff, but the title had not passed, though the possession had been delivered. The defendant, however, had no notice of the plaintiff's claim, and insists upon his lien thereon, with other goods of the guest, for the amount of his bill. The plaintiff's counsel does not seriously contest the proposition that an innkeeper may have such lien on goods in the possession of his guest *infra hospitium*, though they belong to a third person, provided the innkeeper has no notice of that fact. If the innkeeper's liability

would attach in case the sewing machine were lost or stolen, it would seem but just to hold that his lien attaches wherever there is a corresponding liability. Schouler, Bailm., § 292; Manning v. Hollenbeck, 27 Wis. 202; Threfall v. Borwick, L. R. 7 Q. B. 711.

The respondent, however, claims that the judgment may be supported on the ground that the findings of fact show that the party who brought the machine to defendant's hotel was received as a boarder, and remained there as such, and not as a traveler or guest. The evidence is not here, and so the question is not whether it would support a finding either way, but whether it appears from the stipulated facts, which are adopted as the findings in the case, that he was a guest. To entitle the defendant to assert his innkeeper's lien, he must have received the property as the goods of a guest, but this does not appear, and there is no such finding. It appears from the agreed statement that he received the party, his wife, and two children as boarders and lodgers, and that they continued to board and lodge with him for about six months at the rate of $15 per week, and that is all. This does not affirmatively establish the relation of guest and innkeeper, so as to subject him to the liability, or give him the rights incident thereto. Error must appear.

Judgment affirmed.

Lien Given for Improvement by Skill and Labor.

WHITE v. SMITH.

15 Vroom 105 (N. J.), 44 N. J. L. 105, 43 Am. Rep. 347. 1882.

[A wife allowed her husband to use her wagon, and he took it to a wheelwright for necessary repairs. The wheelwright made the repairs, and charged them to the husband, supposing the wagon to be his.]

DEPUE, J. * * * Besides the liens which are allowed to the above mentioned persons, arising out of the public employment in which they are engaged, in a variety of cases other persons have by the common law a right to detain goods on which they have bestowed labor, until the reasonable charges therefor

are paid, although such persons are not obliged to receive the goods for that purpose. 2 Kent Com. 635. Such a lien arises out of the employment of the workman, and belongs strictly to the person who has contracted with the owner to do the work, and does not extend to persons employed by or under him. Story, Bail., § 440; Hollingsworth v. Dow, 19 Pick. 228. Nor does this right of detention arise by the common law in all cases where a chattel is delivered to another by the owner, and services are rendered in the care and custody of it advantageous to the owner's interests. It attaches only where the party to whom the chattel is bailed has expended his skill and labor in the improvement of the chattel, and has thereby conferred an additional value on it. Thus no lien exists at common law for the agistment of cattle, Chapman v. Allen, Cro. Car. 271; Jackson v. Cummins, 5 M. & W. 342; Wallace v. Woodgate, 1 C. & P. 575; nor in favor of one to whom a horse has been delivered to be stabled, taken care of, fed and kept. Judson v. Ethridge, 1 C. M. 742. In such cases, a lien for the charges will only arise by virtue of a statute or special agreement in the nature of a pledge. On the other hand, a livery-stable keeper has a lien for the keep and exercise of a horse sent to him for the purpose of being trained. Bevan v. Waters, 3 C. & P. 520; Forth v. Simpson, 13 Q. B. 680. In Scarfe v. Morgan, 4 M. & W. 270, it was held that when S. sent his mare to M., a farmer, to be covered by a stallion belonging to him, M. had a lien on the mare for the charge for covering her. The distinction between these two classes of cases is pointed out by Parke, B., in Jackson v. Cummins. He says: "The general rule as laid down by Best, C. J., in Bevan v. Waters, and by this court in Scarfe v. Morgan, is that by the general law, in the absence of any specific agreement, whenever a party has expended labor and skill in the improvement of a chattel bailed to him, he has a lien upon it. Now the case of an agistment does not fall within that principle, inasmuch as the agister does not confer any additional value on the article, either by the exertion of any skill of his own or indirectly, by means of any instrument in his possession, as was the case with the stallion in Scarfe v. Morgan; he simply takes in the animal to feed it." * * *

In the present case the wagon was owned by the wife. It was put in the husband's charge for use in a business which

was carried on for the support of the family, and was probably owned and kept for that purpose. It was in the contemplation of all parties that the wagon could be made useful for the purpose for which it was designed to be used only by being kept in repair. The repairs were beneficial to the interests of both parties—to the husband in fitting the wagon for use; to the wife in enhancing the value of the property by the repairs put upon it.

I think it clear, on the facts certified by the court below, that the husband had authority from the wife—implied from the manner in which she permitted the wagon to be used—to have the repairs done; and if so, the property became by law subject to a lien for the workman's charge.

The judgment should be affirmed, with costs.

Judgment affirmed.

Improvement Liens Are Specific—Common Law Liens Are Not Assignable.

MATHIAS v. SELLERS.

86 Penn. St. 486, 27 Am. Rep. 723. 1878.

WOODWARD, J. In the fall of 1872, Sellers & Radey, the plaintiffs below, entered into an agreement with Mathias, the defendant, to furnish him with tobacco at prices that were specified. This tobacco was to be worked up by the defendant into cigars of such kinds and brands as the plaintiffs, from time to time, should designate. Fixed prices for the manufacture of the cigars, according to their quality, were to be allowed, and advances were to be made by the plaintiffs to the defendant for stamps and wages as the work should be done and the cigars be delivered.

On the 6th of November, 1873, the defendant had manufactured 90,000 cigars, which were in his possession. The stamps for them were procured and paid for by the plaintiffs, who alleged at the trial that an agreement was then made with the defendant by which they were to take them away when stamped, and a full and final settlement was afterward to be made. Under this agreement the plaintiffs insisted that the right the de-

fendant possessed to retain the cigars as security for the balance due for their manufacture had been waived. There was conflicting evidence on this branch of the case, the defendant denying the existence of the supplementary agreement. The question was one of fact for the jury, but it does not appear to have been submitted. As the court held that the defendant was not in any event entitled to a lien, it became unimportant to ascertain whether it had or had not been waived.

When the replevin issued, the balance of the account of the plaintiff against the defendant was $2,585.40. This sum included $450 paid for stamps on the 6th of November, 1873, and $54.65 paid to the sheriff, apparently for expenses in the action. The value of the 90,000 cigars the defendant had made was shown by the testimony to be $2,820. Including in the charges against him the $54.65 paid to the sheriff, there was due to the defendant, therefore, the sum of $234.60. Suit was brought without payment or tender of the amount, and the court charged at the trial that the existence of a balance, for work done in manufacturing the cigars, did not defeat the right of the plaintiff to maintain the action.

It has long been a settled rule of the common law, that goods deposited with a tradesman or artisan for manufacture or repair, are subject for the work done on them to a specific lien. Thus, a tailor who has made a suit of garments out of the cloth delivered to him, is not bound to deliver the suit to his employer until he is paid for his services. Neither is a ship carpenter bound to restore the ship which he has repaired; nor a jeweler the gem which he has set, or the seal which he has engraved; nor an agistor the horse which he has taken on hire, until their respective compensations are paid. Story on Bailments, § 440, and the cases there cited. Though the right of lien probably originated in those cases in which there was an obligation, arising out of the public employment, to receive the goods, it is not now confined to that class of persons. A particular lien is given by the common law to any one who takes property in the way of his trade or occupation, to bestow labor and expense upon it. And it exists equally whether there be an agreement to pay a stipulated price, or only an implied contract to pay a reasonable price. 2 Kent's Com. 635. It was said by Holroyd. J., in Crawshay v. Homfray, 4 Barn. & Ald.

50, that the principle laid down in Chase v. Westmore, 5 Maule & Selw. 180, where all the cases came under the consideration of the court, was this, that a special agreement did not of itself destroy the right to retain; but that it did so only where it contained some special term inconsistent with that right.

In 2 Selwin's Nisi Prius, 540, the rule is stated to be, that the right of detaining a thing until the money due upon it be paid, may be waived by a special agreement as to the time or mode of payment; but not merely by an agreement for the payment of a fixed sum. The existence of the principle in its full reach has been recognized in Pennsylvania. McIntyre v. Carver, 2 W. & S. 392, was a replevin for thirty-four panel doors, which McIntyre had made from lumber delivered to him by Carver.

The suit was brought without payment or tender of payment for the work McIntyre had done; but while it was pending, the money was offered and received. It was held that the tender and acceptance came too late to help the plaintiff. "The suit was brought," Chief Justice Gibson said, in entering the judgment, "before the right of action was complete, and such a defect cannot be cured by any subsequent act, except a binding agreement not to take advantage of it." In Pierce v. Sweet, 9 Casey, 151, it was decided that a bailee, to whom logs had been delivered to be converted into boards, had a lien on them for his labor independent of any special agreement; and that he could maintain an action against an execution creditor of the bailor by whom they had been taken out of his possession. It is clear, under all the precedents, that unless the defendant here waived his lien by some such new agreement as that which the plaintiffs set up at the trial, he had the right to retain the cigars in controversy until he was paid for the work he had done in making them.

Nothing that was decided in Mackey v. Dillinger, 23 P. F. Smith, 85, was in conflict with the settled law of lien. Dillinger consigned goods to Moorehead, who advanced $1,500 on them, and then pledged them with other property, to Mackey, to secure a loan for $3,700. Mackey knew they belonged to Dillinger. When they were demanded by Dillinger, Mackey refused to deliver them except on the condition that this loan to Moorehead should be paid. Nothing was said at the time of Moore-

head's advances, and in the action of replevin which Dillinger brought, it was held that Mackey had no right to set up Moorehead's lien in his own defense; that as against him Dillinger could maintain his action without tendering repayment either of the loan made by himself or of the advances made by Moorehead; and that the amount of the advances could be recouped from the damages Dillinger was entitled to recover. The decision was stated in the opinion of the present chief justice to rest on "general doctrine of tender, that when a party declines to accept payment or performance, except in a particular way to which he is not entitled, he cannot insist that the action is prematurely brought."

* * * * * * * * * * * *

Judgment reversed and venire facias de novo awarded.

Livery Stable Keepers and Agistors Have No Lien at Common Law.

BEVAN v. WATERS.

3 C. & P. 520 (Eng.). 1828.

Assumpsit for money paid, etc. From the evidence, it appeared, that two horses named Polecat and Blister, the latter belonging solely to the defendant, the former to the plaintiff and defendant jointly, were put into the hands of a person named Boast, who was a stable keeper, for the purpose of being trained. While they were there, the defendant sold to the plaintiff the horse Blister, and his half share of Polecat; but when the plaintiff applied to Boast to deliver them to him, in pursuance of the bargain, he refused to let Blister go, because the defendant had not paid him his charges for training. Notice was given to the defendant by the plaintiff's agent, that he could not get the horse on account of Boast's claim. The defendant disputed the correctness of the account in some respects, and, whilst the dispute was going on, the plaintiff paid the charges, in order to obtain the horse, and sought to recover the amount, by this action, from the defendant; £40 was remaining due of the purchase money, at the time at which the horse was to be delivered; but Boast's claim, at that time, amounted to £82,

and was afterwards increased, so that the plaintiff was obliged to pay a sum of £130 before Boast would deliver the horse to him.

BEST, C. J. In the case of a livery stable keeper there is no lien, because the horse is subject to the control of the owner and may be taken out by him; and the first time it goes away, there is of course an end of the lien. But I think, as at present advised, that a man who has a horse for training, has a lien for the keep and exercise of it. If Boast had not a just claim against the defendant, I think the plaintiff could not maintain this action. I am of opinion, that if a man buys property which is in the hands of a third person, who sets up an unfounded claim, and will not deliver unless that claim is paid, the purchaser is bound to give notice to the seller, and cannot, after several months, go and pay the demand; because he may, by his delay, deprive the seller of his evidence of the incorrectness of the claim. If the plaintiff in this case had paid without giving notice, I should have decided that he could not recover.

It was determined in the reign of Queen Anne (Yorke v. Greenaugh, 2 Lord Raym. 866) that a livery stable keeper had not a lien upon a horse for its keep, and I decided upon that principle in a case in this Court lately. (Wallace v. Woodgate, 1 Carr. & P. 575). But in the present case there is a difference, for the trainer has not only to keep the horse, but also to prepare it for racing; and therefore I think he has a lien upon it. For I take it to be a common law principle, that if a man has an article delivered to him, on the improvement of which he has to bestow trouble and expense, he has a right to detain it until his demand is paid. On the facts in this case, it appears that the sheriff was bound to pay £40, as the balance of the purchase money, which he has not paid, and if the lien did not exceed that sum, then undoubtedly he could not maintain this action. But it appears that Boast's demand was £150; and though there were sundry payments, yet he had a right to apply them to the demand for Polecat, as he had parted with Polecat, and had no lien upon him. It appears that there was a balance of £82 for which Blister might be detained. In point of law and in point of justice also, the defendant ought to have cleared away that claim; and, not having done so, he is liable to the plaintiff for such proportion as was due in the month of Sep-

tember, at which time the horse should have been delivered. And as the horse was not delivered then, I think the plaintiff is entitled to some part of the demand for the subsequent time; but not the whole of it; because, if the horse had been delivered at the proper time, he would have been obliged to bear the expense of keeping it.

Verdict for the plaintiff.

Finders Have No Liens at Common Law.

NICHOLSON v. CHAPMAN.

2 H. Black. 254, 126 Reprint 536 (Eng.). 1793.

This was an action of trover, brought under the following circumstances:

A considerable quantity of timber, the property of the plaintiff, was placed in a dock on the banks of the Thames, but the ropes with which it was fastened accidentally getting loose, it floated, and was carried by the tide as far as Putney, and there left at low water, upon a towing path within the manor of Wimbledon. Being found in this situation, the bailiff of the manor, one Fairchild, employed the defendant Chapman, to remove the timber with his wagon from the towing-path, which it obstructed, to a place of safety at a little distance. This Chapman accordingly did, and when the plaintiff sent to demand the timber to be restored to him, refused to deliver it up, unless £6 10s. 4d. were paid, which he claimed partly by way of salvage, as a customary right due to the lord of the manor, and partly as a recompense to himself for the trouble of drawing the timber from the water side to the place where it then lay; but this demand the plaintiff refused to comply with, and did not tender any other sum.

The bailiff acted under the following order, made at a court-leet of the lord of the manor, in May 1792, "Complaint having been made to this court of the great detriment arising to the tenants, etc., within this manor, from timber having been left by the tide upon the towing-path within the same; it is ordered, that Francis Fairchild, the bailiff of this manor, do, under the authority of this court, remove the same to a proper place of

safety, until the lord or his steward shall give proper directions, for the benefit of the particular owner or proprietor thereof." But no such customary right as was set up in the lord, was established at the trial; the Lord Chief Justice therefore directed the jury to ascertain what they thought a proper compensation for the carriage of the timber by the defendant, as above stated. They answered that two guineas were a reasonable sum for that purpose, upon which it was agreed that a verdict should be found for the plaintiff for the value of the timber, subject to the opinion of the Court on the question, whether there ought not to have been a tender of two guineas, before action brought, if the Court should be of that opinion, the verdict to be entered for the defendant, he undertaking to deliver up the timber on payment of two guineas; but if they should be of a contrary opinion, then the verdict to be entered for the value.

On this day, after consideration, the opinion of the Court was thus delivered by

LORD CHIEF JUSTICE EYRE. The only difficulty that remained with any of us, after we had heard this case argued, was upon the question whether this transaction could be assimilated to salvage. The taking care of goods left by the tide upon the banks of a navigable river, communicating with the sea, may in a vulgar sense be said to be salvage; but it has none of the qualities of salvage, in respect of which the laws of all civilized nations, the laws of Oleron, and our own laws in particular, have provided that a recompense is due for the saving, and that our law has also provided that this recompense should be a lien upon the goods which have been saved. Goods carried by sea are necessarily and unavoidably exposed to the perils which storms, tempests and accidents (far beyond the reach of human foresight to prevent) are hourly creating, and against which, it too often happens that the greatest diligence and the most strenuous exertions of the mariner cannot protect them. When goods are thus in imminent danger of being lost, it is most frequently at the hazard of the lives of those who save them, that they are saved. Principles of public policy dictate to civilized and commercial countries, not only the propriety, but even the absolute necessity of establishing a liberal recompense

for the encouragement of those who engage in so dangerous a service.

Such are the grounds upon which salvage stands; they are recognized by Lord Chief Justice Holt in the case which has been cited from Lord Raymond and Salkeld, 1 Ld. Raym. 393. Salk. 654, pl. 2. But see how very unlike this salvage is to the case now under consideration. In a navigable river within the flux and reflux of the tide, but at a great distance from the sea, pieces of timber lie moored together in convenient places; carelessness, a slight accident, perhaps a mischievous boy, casts off the mooring rope, and the timber floats from the place where it was deposited, till the tide falls and leaves it again somewhere upon the banks of the river. Such an event as this, gives the owner the trouble of employing a man, sometimes for an hour, and sometimes for a day, in looking after it till he finds it, and brings it back again to the place from whence it floated. If it happens to do any damage, the owner must pay for that damage; it will be imputable to him as carelessness, that his timber in floating from its moorings is found damage-feasant, if that should happen to be the case. But this is not a case of damage-feasance; the timber is found lying upon the banks of the river, and is taken into the possession, and under the care of the defendant, without any extraordinary exertions, without the least personal risk, and in truth, with very little trouble. It is therefore a case of mere finding, and taking care of the thing found (I am willing to agree) for the owner.

This is a good office, and meritorious, at least in the moral sense of the word, and certainly entitles the party to some reasonable recompense from the bounty, if not from the justice of the owner; and of which, if it were refused, a court of justice would go as far as it could go, towards enforcing the payment. So it would if a horse had strayed, and was not taken as an estray by the lord under his manorial rights, but was taken up by some good-natured man and taken care of by him, till at some trouble, and perhaps at some expense, he had found out the owner. So it would be in every other case of finding that can be stated (the claim to the recompense differing in degree, but not in principle); which therefore reduces the merits of this case to this short question, whether every man who finds the property of another, which happens to have been lost or

mislaid, and voluntarily puts himself to some trouble and expense to preserve the thing, and to find out the owner, has a lien upon it for the casual, fluctuating and uncertain amount of the recompense which he may reasonably deserve? It is enough to say, that there is no instance of such a lien having been claimed and allowed; the case of the pointer-dog, 2 Black. 1117, was a case in which it was claimed and disallowed, and it was thought too clear a case to bear an argument. Principles of public policy and commercial necessity support the lien in the case of salvage. Not only public policy and commercial necessity do not require that it should be established in this case, but very great inconvenience may be apprehended from it, if it were to be established.

The owners of this kind of property, and the owners of craft upon the river which lie in many places moored together in large numbers, would not only have common accidents from the carelessness of their servants to guard against, but also the wilful attempts of ill-designing people to turn their floats and vessels adrift, in order that they might be paid for finding them.

I mentioned in the course of the cause another great inconvenience, namely, the situation in which an owner seeking to recover his property in an action of trover will be placed, if he is at his peril to make a tender of a sufficient recompense, before he brings his action: such an owner must always pay too much, because he has no means of knowing exactly how much he ought to pay, and because he must tender enough. I know there are cases in which the owner of property must submit to this inconvenience; but the number of them ought not to be increased; perhaps it is better for the public that these voluntary acts of benevolence from one man to another, which are charities and moral duties, but not legal duties, should depend altogether for their reward upon the moral duty of gratitude. But at any rate, it is fitting that he who claims the reward in such case should take upon himself the burden of proving the nature of the service which he has performed, and the quantum of the recompense which he demands, instead of throwing it upon the owner to estimate it for him, at the hazard of being nonsuited in an action of trover.

Judgment for the plaintiff.

Offers of Rewards May Entitle Finders to Liens.

WOOD v. PIERSON.

45 Mich. 313, 7 N. W. 888. 1881.

[Action of replevin. Defendant in error lost a diamond pin, and advertised the same, offering a reward of $25 for its return. Plaintiff in error found a pin, similar to the one advertised, which he offered to deliver up upon its being identified as the one lost, and payment of the reward. As inspection by defendant in error was refused, and claimant not satisfying plaintiff as to its identity, he declined to surrender the same.]

GRAVES, J. * * * According to the common law the finder of goods lost on land becomes proprietor in case the true owner does not appear. And meanwhile his right as finder is a perfect right against all others. But if the true owner does appear whatever right the finder may have against him for recompense for the care and expense in the keeping and preservation of the property, his status as finder only does not give him any lien on the property. Yet if such owner offer a reward to him who will restore the property a lien thereon is thereby created to the extent of the reward so offered. This doctrine in favor of a lien in such circumstances is so laid down in Prescott v. Neale, 12 Gray, 222, and authorities are cited for it. Among them is the leading case of Wentworth v. Day, by Chief Justice Shaw, reported in 3 Metcalf, 352, and which is approved and followed by the supreme court of Pennsylvania in Cummings v. Gann, 52 Pa. St. 484, and adopted as correct by Story in his work on Bailments, §§ 121a and 621a. Parsons has given it his sanction by incorporating it in the text of his work on Contracts (volume 3, p. 239, 6th ed.), and Edwards presents it as settled law in his treatise on Bailments, §§ 20, 68 (2d ed.)

Under this principle the admission is unavoidable that when Pierson claimed the pin on the footing of his notice and reward of Chapman the finder who was holding it for the actual owner it was as between them subject to a lien in Chapman's favor, and against Pierson for the reward. According to the language of the books Chapman was entitled to detain the article from Pier-

son until the reward should be paid, and was under no legal obligation to relinquish possession to him or to give it to another or to allow anything to be done endangering his right or security. But there was a mutuality of rights. As claimant Pierson was entitled to a reasonable time and to fair and reasonable opportunity in reference to the nature of the chattel, the existing state of things, bearing on the transaction and the surrounding circumstances, and without impairing Chapman's right as contingent owner, nor his right of lien, nor interfering with his duty to the true ownership which might be subsequently asserted and by another, to make such a showing as he could that the property was the same he had lost and advertised, and such evidence as would satisfy a fair and reasonable person of the fact.

* * * * * * * * * * *

Whether as between the parties and in view of all the considerations bearing on their rights and duties and on the conveniences and inconveniences of identification growing out of the nature of the property, and bearing on the chances for imposition and on the fact of Chapman's being liable to account to whoever should at last be found to be actual owner, it was reasonable and fairly due to Pierson to have a personal inspection to enable him to say that the pin was or was not his property, and if he thought it was, then to facilitate his proof, was not a matter of law. It depended on the peculiarities of the case and was a question for the jury under instructions conforming to the principles here explained. * * *

It is enough to say now that whatever may have been intended, the charge as we find it in the record must have been received by the jury as instructing them that the defendants were bound to submit the pin to the personal inspection of the plaintiff on his request as a safe and proper expedient for the purpose of "searching out the right owner," and they could not have supposed that it was submitted to them to decide according to their own judgment of the circumstances whether the defendants ought or ought not to have allowed such inspection. The question was not for the bench but for the jury under suitable instruction.

The result reached is that the judgment must be reversed with costs and a new trial granted.

The Lien of a Factor.

MARTIN v. POPE & SON.

6 Ala. 532, 41 Am. Dec. 66. 1844.

[Assumpsit by Pope & Son upon a promissory note for two thousand two hundred and twenty-five dollars, given by Moffitt, with Martin and Horn as sureties. Verdict and judgment for one thousand and fifty-three dollars and thirty cents. Plaintiffs were commission merchants, and Moffitt a planter, who was in the habit of sending them his cotton crop to sell. In March, 1839, he obtained an advance of two thousand dollars, giving the note in suit, drawn at ten months. The next March he sent Pope & Son his crop, amounting to one hundred and thirteen bales, which they sold, returning an account of one thousand nine hundred and nine dollars and sixty-three cents for the proceeds thereof, but without showing how they had appropriated it.

* * * * * * * * * * *

Subsequently to March, 1839, Moffitt became indebted to plaintiffs for various articles, in the aggregate sum of six hundred and thirteen dollars and eighty-seven cents, and three hundred and six dollars for hire of negroes, which last, it was proved, was not connected with the business of a commission merchant. These sums the plaintiffs claimed the right to retain out of the proceeds of the cotton, before applying it to the note. The judge charged that if Moffitt gave no directions for applying the money received from the cotton, the plaintiffs had the right to apply it to any item in their account, at any time.]

BY COURT, COLLIER, C. J. It is not pretended that there was a special contract between the plaintiffs and Moffitt, in respect to their transactions, which would vary the duties and liabilities of the former as the factors of the latter. We must then consider the case in reference to the principles of law applicable to such agents when dealing with their principals. The engagement of a factor who undertakes the sale of goods or merchandise, for a compensation, is, that he will faithfully dispose of the same, with a proper regard to the advices of his principal, and honestly account for the proceeds. He is entitled

to a lien, not only upon the goods themselves, for advances, and for commissions consequent upon their proceeds, and for what may be due him upon a general balance of accounts growing out of similar dealings. This lien arises upon an agreement which the law implies in the absence of any express stipulation upon the subject: Paley on Agency, 127-129, 142-147; Story on Agency, 421, 435.

In Houghton et al. v Mathews et al., 3 Bos. & Pul. 485, it was decided that the demand for which the factor claimed a lien must be connected with and constitute a part of his dealings, as such, with his principal; for if it was a species of debt foreign to that relation, or accruing before its commencement, the lien would not be enforced: Paley on Agency, 135-137; Story on Agency, 387-389. The correctness of these principles is conceded by both parties, but it is argued for the defendant, that the plaintiffs had a lien upon the cotton consigned to them by Moffitt, and since its sale, upon the proceeds; that they can not relinquish their lien and resort to an action against the sureties of their principal, but must appropriate the money received by them to the payment of their account as factors, in the order in which the advances were made, or in which the respective sums charged became payable.

The general lien of factors does not depend upon any express contract, but rests upon its manifest tendency to aid the interests of trade and commerce, and to promote confidence and a liberal spirit on the part of factors in respect to advances to their principals. It is deemed to exist in all cases, until the contrary presumption is clearly established: Story on Agency, 388, 389; Paley on Agency, 127, 128. And where a factor makes advances, independent of an actual agreement to that effect, the legal inference is, that they were made upon the joint credit of the personal security of the principal, and of his goods and money that might come to hand. This being the case, the factor may relinquish his lien on the latter without at all affecting his personal remedy; so he may renounce his right to resort to the person, and look alone to his lien for reimbursement: Burrell v. Phillips, 1 Gall. 360; Peisch v. Dickson, 1 Mason, 9. It is then a right of which the factor, or his representatives, may avail themselves; but where there is no contract other than that which is implied, one who has become a surety of the

principal, to refund advances made to him, can not elect for the factor, and force him (at least at law), to assert his lien upon the goods or money of the principal. * * *

Without extending this opinion, by a particular examination of the charges given and refused, it will be readily perceived from what has been said, that no error has been committed which is available for the defendant below. The judgment is consequently affirmed.

The Retaining Lien of an Attorney.

SANDERS v. SEELYE.

128 Ill. 631, 21 N. E. 601. 1889.

WILKIN, J. The case of Land Co. v. Peck (a statement which will be found in 112 Ill. 414, 430) having been reversed and remanded by this court, pending in the circuit court of Cook county, a dispute arose between appellant and appellees, his former attorneys, as to the fees of the latter, and out of that controversy grew the further one as to whether or not appellees were entitled to a lien upon the 195 bonds of appellant involved in the Peck suit. Appellant, having discharged said attorneys, tendered them $175 in full of all fees due them, and demanded the surrender of the bonds, which being refused, he filed this petition for a rule on them to surrender and deliver up the same to him. Upon being ruled to show cause why they should not be required to do so, respondents set up a retaining lien for fees, which they claim were due and unpaid from petitioner, for services rendered by them in said cause; appellants Quick & Miller claiming $5,000 for such services in the appellate court of the First District and the supreme court, and $500 for services after the reversal, and before they were finally discharged. * * * We think the merits of the case may be fully and fairly considered under three heads, viz.: First. Has an attorney a retaining lien in this state as a matter of law? Second. Are the facts essential to the existence of such a lien established by the proofs in this case? Third. Does the evidence justify the decree as to the amounts found due?

Attorney's liens are classed as general or retaining liens, and charging or special liens. The first attaches to all papers, doc-

uments, etc., which he receives professionally; the second, only upon that which is recovered through his professional services. This latter right of lien has been denied by this court in several cases. In Humphrey v. Browning, 46 Ill. 476, it was held that he had no lien upon real estate recovered in ejectment; in Forsythe v. Beveridge, 52 Ill. 268, that he had no such lien upon a judgment recovered; and so in each of the other cases cited by counsel it was held that no lien existed in his favor upon the subject matter of the suit. Although expressions are used in the opinions of some of these cases which seem to deny an attorney's right to the retaining lien also, in none of them was that question before the court, nor was it decided. It is now, therefore, to be treated as an open question in this state. That it is a well-established common-law right must be conceded. Stevenson v. Blakelock, 1 Maule & S. 535; St. John v. Diefendorf, 12 Wend. 261; Dennett v Cutts, 11 N. H. 163; Walker v. Sargeant, 14 Vt. 247; Ward v. Craig, 87 N. Y. 551. No reason is perceived for denying the existence of that right in this state. There is nothing in our statute which changes the common-law relations between attorneys and their clients in such a manner as to affect this right; nor are we able to see wherein this rule of the common-law is inapplicable to "the habits and conditions of our society, or contrary to the genius, spirit, and objects of our institutions." We therefore hold that in a proper case an attorney in Illinois may legally maintain such a lien.

Passing to the next question, the authorities seem to be uniform in holding that this retaining lien exists on all papers or documents of the client placed in the attorney's hands in his professional character, or in the course of his professional employment Stokes, Liens, Attys. 67; Weeks, Attys. § 372, p. 614; Whart., Ag. § 625; Story, Ag. § 383, and it makes no difference what the purpose may have been in placing them in the attorney's hands, Weeks, Attys. § 372, supra; Whart., Ag. § 625, note 1. Did the bonds in question come into the possession of appellees within the meaning of these rules? It is insisted that they were left with Seelye merely for safe-keeping, subject to appellant's orders, and that their deposit with him had no connection with either his or Quick & Miller's professional employment in the Peck case. This position is wholly incon-

sistent with the remedy appellant is now seeking to enforce. If Seelye was a mere custodian of these bonds for safe-keeping, and held them only subject to appellant's order, by what authority can the circuit court of Cook county, in the Peck case, make an order requiring respondents to show cause why they do not surrender them? We think, however, that the evidence is clear to the effect that they were placed in the hands of Seelye as the attorney of appellant in the Peck case, so that they might be used in securing to the client the benefits resulting to him from the successful litigation of that case in the supreme court; and, whatever may have been appellant's understanding as to the amount of fees to be paid, it cannot be claimed that he did not fully understand that Quick & Miller and Seelye were acting together as his attorneys in that case. Therefore, whether the bonds were delivered to Seelye alone, or to him and Quick & Miller jointly, the lien would attach for the benefit of all. It is also clear from the evidence that appellant knew that these bonds had been deposited by Seelye in the safe of Quick & Miller, and that they claimed a lien upon them for their services; and with such knowledge he permitted them thereafter in the further management of said cause. We are of the opinion, therefore, that the circuit court was justified in holding that said bonds were subject to a lien in favor of appellees for any balance due and unpaid them for their fees as the attorneys of appellant.

The Lien of a Seller of Personal Property.

CRUMMEY v. RAUDENBUSH.

55 Minn. 426, 56 N. W. 1113. 1893.

Action by George B. Crummey against S. W. Raudenbush for breach of contract of sale. Judgment was ordered for defendant, and plaintiff appeals.

MITCHELL, J. Stated according to its legal effect, the contract, upon which this action was brought, was an executory one for the sale of a piano by defendant to plaintiff, a part of the price being paid at the date of the contract, and the balance to be paid in quarterly installments from and after the date of the delivery of the piano. The action is for damages for a

refusal to supply the piano according to the contract. It is not alleged that the balance of the price has ever been paid or tendered, the plaintiff standing on the terms of the contract that it was to be furnished on credit. Much of the answer consists of entirely irrelevant matters, the only defense alleged being that since the making of the contract the plaintiff had become, and still is, insolvent, and the only important question in the case is whether the defendant has established a defense justifying his refusal to deliver the piano on that ground. Where a vendor contracts to sell personal property on credit, he thereby agrees to waive his lien for the purchase money; but he does so on the implied condition that the vendee shall keep his credit good. If, therefore, before payment, and while the vendor still retains possession of the property, he discovers that the vendee is insolvent, he may hold the goods as security for the price. The insolvency of the vendee does not rescind the contract, and is not of itself a ground for rescission. It merely entitles the vendor to demand payment in cash before parting with possession of the property. Courts have differed as to the name to be given to this right, but they all recognized its existence. Like the analogous right of stoppage in transitu, it grows out of the vendor's original ownership and dominion, and is founded on the equitable principle that one man's property ought not to go to pay another man's debt. The right is not limited to cases where the insolvency of the vendee occurred after the date of the contract, but exists also even where the insolvency existed at that time, but was not discovered by the vendor until afterwards; and, as the presumption of both reason and law is that, where a vendor sold goods on credit, he believed that the purchaser was solvent and able to pay, the burden is on the vendee to prove that the vendor had knowledge of the insolvency at the time, and entered into the contract with that knowledge. The right is not affected by the fact that part of the price has been paid; and it makes no difference whether the sale was of a specific article appropriated to the contract, or, as in this case, a contract to supply an article of a certain description. The term "insolvent" is not used in any technical sense. It is not necessary that the vendee should have been adjudged a bankrupt or insolvent, or have made an assignment of his property. In-

solvency, as applied to this branch of law, means a general inability to pay one's debts or to meet one's financial engagements. Passing to the facts of this case, an examination of the evidence satisfies us that it amply justified the trial court in finding that the plaintiff was insolvent in the fullest sense of the term. It follows that defendant had a right to refuse to deliver the property without payment in full of the price, provided he properly asserted that right, and had not in some way waived it.

The contract was made in April, 1889. The evidence is practically undisputed that for some two years afterwards the defendant was not only able and ready to furnish the piano, but repeatedly urged the plaintiff to come and select an instrument, but that he failed to do so, giving as a reason his inability to meet the payments. Finally, in the winter or early spring of 1893, after defendant had ceased to represent that make of piano in the trade, and hence no longer kept it in stock, the plaintiff for the first time formally demanded the delivery of the instrument within a specified time. Failing in some efforts to induce plaintiff to accept a piano of another kind, the defendant required some assurance that, if he procured a piano of the kind called for by the contract, the plaintiff would be ready to pay for it in cash, or give a mortgage on the instrument to secure the purchase price. The plaintiff positively refused to agree to do either, and insisted on the terms of the original contract for the delivery of the property on credit, which defendant as positively refused to do. The evidence would fully justify the conclusion that the defendant was always willing to furnish the piano if plaintiff would pay the price in cash, or secure it by mortgage on the property, and that his refusal merely went to the extent of refusing to furnish it on credit without security.

Order affirmed.

The Right of a Vendor to Stop Goods in Transit.

LOEB & BRO. v. PETERS & BRO.

63 Ala. 243, 35 Am. Rep. 17. 1879.

MANNING, J. Munter & Brother, being largely in debt, and insolvent, by an order requesting shipment to them, bought

of plaintiffs, J. M. Peters & Brother, of Virginia, twenty-five boxes of tobacco; which they accordingly sent as directed, to Munter & Brother, at Montgomery, Alabama, by railroad, forwarding to them by mail a bill of lading therefor. On receipt of this, several days before the boxes arrived, Munter & Brother indorsed it, and transferred their right to the goods to J. Loeb & Brother, who gave them credit for the same, on a debt past due, which Munter & Brother owed them. There was no other consideration for this transfer. Soon afterward, Peters & Brother, being informed of the insolvency of Munter & Brother, and claiming the right to stop the tobacco *in transitu,* demanded it of the carrier, the South & North Alabama Railroad Company, and sued the same in detinue for it, having first offered to pay the freight money. Loeb & Brother intervened as claimants, and thereby obtained possession of the goods, whereupon, the suit was prosecuted against them, to a verdict and judgment in favor of Peters & Brother, from which Loeb & Brother have appealed to this court. * * *

We do not concur in the opinion expressed in Rodgers v. Thomas, 20 Conn. 54, that a vendor of goods, in transit to an insolvent vendee, cannot stop them on the way, before delivery, unless the insolvency of the vendee occurred after the sale to him of the goods. We think, with the Supreme Court of Ohio, that the vendor may stop the goods upon a subsequent discovery of insolvency existing at the time of the sale, as well as upon a subsequent insolvency. If there be a want of ability to pay, it can make no difference, in justice or good sense, whether it was produced by causes, or shown by acts, at a period before or after the sale. Benedict v. Schaettle, 12 Ohio St. 515; Reynolds v. Boston M. R. R. Co., 43 N. H. 589; O'Brien v. Norris, 16 Md. 122; Blum v. Marks, 21 La. Ann. 268. The best definition of the right which we have seen is that in Parsons' Mercantile Law, as follows: "A seller who has sent goods to a buyer at a distance, and after sending them, finds that the buyer is insolvent, may stop the goods at any time before they reach the buyer. His right to do this is called the right of stoppage in transitu. Chap. X, p. 60."

If before this right is exercised, the buyer sells the goods, and indorses the bill of lading for them to a purchaser in good faith and for value, the right of the first vendor to retake them

is extinguished. Lickbarrow v. Mason, 1 Smith's Lead. Cases, 388. Evidence, therefore, that Loeb & Brother knew, when they took a transfer of the bill of lading, that Munter & Brother were insolvent, was relevant and proper to show, in connection with other testimony, that Loeb & Brother were not *bona fide* purchasers. * * *

The two judgments against Munter & Brother, in favor of creditors, confessed by the former before the tobacco had reached its destination, and the seizure upon execution the next day of property of Munter & Brother, by the sheriff, tended to prove their insolvency; and the evidence of those facts was therefore properly admitted.

The transfer of a bill of lading, as a collateral to previous obligations, without anything advanced, given up, or lost on the part of the transferee, does not constitute such an assignment as will preclude the vendor from exercising the right of stoppage *in transitu*. Said Bradley, C. J., in Lesassier v. The South-western, 2 Woods, 35: "Nothing short of a *bona fide* sale of the goods for value, or the possession of them by the vendee, can defeat the vendor's right of stoppage *in transitu;* and hence it has been held, that an assignee in trust for creditors of the insolvent vendee is not a purchaser for value, and consequently takes subject to the exercise of any right of stoppage *in transitu* which may exist against the assignor. Harris v. Pratt, 17 N. Y. 249." Wherefore it was held in the latter case, that an attachment in the suit of the vendee's creditor, of goods landed by the carrier upon a wharf-boat at the place of delivery, did not prevent the vendor from stopping them *in transitu*. See also O'Brien v. Norris, 16 Md. 122; Naylor v. Dennie, 8 Pick. 199; Nicholls v. Lefeuvre, 2 Bing. (N. C.), 83. The doctrine is based upon the plain reason of justice and equity, enunciated in D'Aguila v. Lambert, 2 Eden Ch. 77, that "one man's property should not be applied to the payment of another man's debt." The right itself is regarded as an extension merely of the lien for the price, which the seller of goods has on them while remaining in his possession; which lien the courts will not permit to be superseded, before the vendee, who has become insolvent, obtains possession, unless in the meantime the goods have been sold to a person who, in good faith, has paid value for them, and so would be a loser by his purchase,

if that were held invalid. Appellants having only credited Munter & Brother on a debt previously due from them, with the price of the tobacco, have nothing more to do, in order to get even, than to debit them with the same sum, for the non-delivery of the goods in consequence of the defect in Munter & Brother's title.

Judgment affirmed.

Necessity of Delivery to Create a Pledge.

HUNTINGTON ET AL. v. SHERMAN.

60 Conn. 463. 1891.

LOOMIS, J. This is an action of replevin to recover the possession of certain personal property, consisting of tools and machines used by the defendant in his business as tinner, and particularly described in the complaint. The facts found by the trial court, so far as they are material to our present discussion, are as follows: The plaintiffs were partners in business in the town of Woodbury, and as such partners were the owners of a certain shop building there. The defendant leased the shop from the plaintiffs, and occupied it as a tinner's shop. The implements and chattels mentioned in the writ of replevin were owned by the defendant and his partner, Eli Sherman, as a partnership doing business in Woodbury under the firm name of E. & D. H. Sherman. In the latter part of August or early part of September, 1887, the defendant owed the plaintiffs the sum of $96 as rent for the shop. At this time all the implements and chattels mentioned in the complaint were in the shop, and continued in the possession and daily use of the defendant in his occupation as tinner, and were not out of his possession until they were taken by the plaintiffs by a writ of replevin in January, 1888.

On or about October 1, 1887, the defendant agreed by parol to turn out to the plaintiffs the implements and chattels mentioned in the complaint, as security for the $96 above mentioned, but no delivery of them was made to or possession obtained by the plaintiffs. The only writing or memorandum made between the parties in relation to the transfer of the articles was a list

of them made by A. D. Warner, one of the plaintiffs, in the presence and with the aid of the defendant. Several days after the memorandum was made the defendant agreed with the plaintiffs that the articles should remain in the shop until the indebtedness was paid. On the 7th day of November, 1887, the plaintiffs wrote the defendant a letter notifying him to quit possession of the shop. On or about the 8th of November the defendant did quit possession, and removed the implements and chattels in question, together with other personal property, to his residence near by, where he carried on his business with the tools until they were replevied by the plaintiffs in January, 1888. He has never paid the debt of $96 to the plaintiffs. The essential elements of this action are clearly defined in section 1323 of the General Statutes, where it is expressly provided that the action may be "maintained to recover any goods or chattels in which the plaintiff has a general or special property, with a right to their immediate possession, and which are wrongfully detained from him in any manner." The important contention in this case relates to the plaintiff's title and right to immediate possession. No general property is claimed by them, but only an interest and right to the possession as pledgees to secure a debt due them from the defendant. The latter, however, if established, will suffice, for by law the right to the immediate possession may be in one person while the title is in another. This frequently arises in cases of bailments for special purposes.

There is a distinction of controlling importance in this case between an executory pledge contract and an actual pledge. The essentials of the contract are (1) a subject-matter; (2) a debt or engagement; (3) a meeting of the minds of the parties that the subject-matter shall be handed over to secure the payment or fulfillment of the debt or engagement. But to consummate the contract and constitute the pledge there must be delivery. Until this takes place there is no pledge, but only an executory pledge contract. If such contract is supported by sufficient consideration, each party may hold the other bound to perform it. Damages may, of course, be recovered for non-performance, and in some cases, doubtless, equity might decree specific performance. In the case at bar the court expressly finds that "all the implements and chattels mentioned in the

plaintiffs' complaint were in the shop, and continued in the possession and daily use of the defendant in his occupation as a tinner, and the same were not out of his possession until they were taken by the plaintiffs by writ of replevin," etc. And again the court in another connection says: "No delivery of the goods was made to or possession obtained by the plaintiffs." This is conclusive that there was no actual delivery. Was there any constructive delivery?

The sole foundation for the latter is the finding that, "several days after the memorandum was made, the defendant agreed with the plaintiff that the articles should remain in the shop until the indebtedness was paid;" but the circumstances ordinarily furnishing a basis for constructive delivery are wholly wanting. The goods were not at sea, nor in a warehouse, nor were they too ponderous to be readily moved, nor were they placed within the power and control of the plaintiffs. It is true the plaintiffs owned the shop where the goods were, but the defendant as lessee held lawful possession, and how long he would or could so hold was uncertain. The pledge agreement contemplated no time for surrendering the possession of the shop to the plaintiffs. There was formerly very little disagreement among the authorities in regard to the proposition that to complete a pledge the pledgee must take possession, and that to preserve the pledge he must retain possession (unless a redelivery to the pledgor was made for some temporary purpose.) The greater number of authorities still continue to support this doctrine. * * *

We have observed, however, for several years a growing laxity on the part of judges and jurists in the application of the principles of constructive pledge delivery, until now it must be confessed there are authorities of great weight and respectability that hold that, as between the parties themselves, an actual delivery may not be necessary, and that the possession may be regarded constructively where the contract places it. Keiser v. Topping, 72 Ill. 226; Tuttle v. Robinson, 78 Ill. 332; Martin v. Reed, 11 C. B. (N. S.) 736; Easton v. Bank, 127 U. S. 536, 8 Sup. Ct. Rep. 1297; Schouler, Bailm. 182-185. The exigency of the present case does not require us to decide whether the pledgor himself may not in some cases be the agent of the pledgee to take and keep possession for the latter, or whether

there may not be cases where the possession may be considered constructively where the contract places it; for it is manifest that there must be in all cases a valid executory contract to uphold the transaction and secure the thing pledged to the pledgee while there is no actual change of possession. In other words, the executory pledge contract must have force and vitality enough to compel an execution of it, to be good between the parties. In the present case there was, in the absence of actual delivery no valid consideration. The only consideration was a pre-existing debt, but there was no agreement for forbearance, no change at all in the debt, and no change in the condition of the plaintiffs or defendant. In other words, there was no benefit whatever to the promisor, and no detriment or inconvenience to the promisee. Had there been an actual delivery of the things pledged, even without an agreement for forbearance, then the new duties and obligations imposed on the pledgee in respect to the care of the pledge would have furnished a sufficient consideration to support the transaction. We conclude, therefore, that there was no right in the plaintiffs to the immediate possession of the chattels replevied, and consequently no error in the judgment complained of.

The other judges concurred.

Innkeeper's Lien on Property Brought to the Inn by Persons Other Than Owner.

ROBINSON v. WALTER.

3 Bulst. 269, 81 Reprint 227 (Eng.). 1484.

The case upon the defendant's plea in bar was this, the defendant keeping a common inn, a stranger brings the plaintiff's horse into this common inn of the defendant's, there sets him for some time, and afterwards goes his way, leaving the plaintiff's horse there as a pledge for his meat.

The defendant, being the inn-keeper, being not paid for the meat of the horse, retains the horse for his meat; the plaintiff afterwards, being the true owner of the horse, and hearing that his horse was there, demanded his horse of the defendant, who refused to deliver him, upon this he brings his action; the

defendant by way of plea in bar, sets forth all this matter of his keeping a common inn, how that the horse was brought thither, and there left at meat, which was unpaid, and that he retained the horse for his meat, till he was satisfied for the same, and that if the plaintiff would pay him for his meat, he would then deliver the horse to him, but not otherwise; upon this plea the plaintiff demurred in law.

Upon the first opening of this case, the Court inclined to be of opinion against the plaintiff; that the defendant's plea was good, and that he might well retain the horse, and that against the plaintiff, being the true owner of him, until he was satisfied by him for his meat, and notwithstanding his horse was left there by a stranger, unknown to the owner; and for this was remembered the books of 39 H. 6, fol. 18 b, and 5 H. 7, fol. 15 b, the case of the leather converted.

DODDERIDGE, J. This is a common inn, and the defendant a common inn-keeper, and this his retainer here, is grounded upon the general custom of the land; he is to receive all guests and horses that come to his inn; he is bound, as he is an inn-keeper, to receive them, and therefore there is very great reason for him to retain him, until he be satisfied for his meat which he hath eaten; and that the true owner of the horse cannot have him away, until he have satisfied the inn-keeper for his meat.

Innkeeper's Knowledge That the Goods Do Not Belong to Guest.

COOK v. KANE.

13 Oreg. 482, 57 Am. Rep. 28. 1886.

LORD, J. This suit was instituted by the plaintiff, as an inn-keeper, to enforce a lien against a piano, put in his possession by the defendant as his guest, for a debt due for lodging and entertainment. By the facts stipulated, it is admitted that the relation of inn-keeper and guest existed between the plaintiff and defendant when the plaintiff, at the request of the defendant, paid the freight charges on the piano, and took it into his custody; that the piano was in fact the property of a third per-

son, who had consigned it to the defendant to sell on commission, but that the plaintiff did not know it was the property of such third person, but received it in his character as an inn-keeper and as the property of his guest. Upon this state of facts, we are to inquire whether the piano is chargeable with an inn-keeper's lien for board and lodging furnished his guest.

At common law the liability of an inn-keeper for the loss of the goods of his guest is special and peculiar, and like that of the common carrier, is founded on grounds of public policy. It must not, however, be confounded with that of a common carrier; the liabilities, though similar, are distinct. Clark v. Burns, 118 Mass. 275; s/c., 19 Am. Rep. 456; Schouler Bailm. 259. Whatever controversy may exist in the judicial mind as to the true measure of the inn-keeper's responsibility, it cannot be denied that his liability for the loss of the goods of his guest is extraordinary and exceptional. Schouler Bailm. 261, and notes; Coggs v. Bernard, 1 Smith Lead. Cas., Am. Notes, 401. Compelled to afford entertainment to whomsoever may apply and behave with decency, the law, as an indemnity for the extraordinary liabilities which it imposes, has clothed the inn-keeper with extraordinary privileges. It gives him as a security for unpaid charges, a lien upon the property of his guest, and upon the goods put by the guest into his possession. Overton Liens, 129. Nor is the lien confined to property only owned by the guest, but it will attach to the property of third persons for whom the guest is bailee, provided only he received the property on the faith of the inn-keeping relation. Schouler Bailm. 292; Calye's case, 1 Smith Lead. Cas. 247; Manning v. Hollenbeck, 27 Wis. 202. But the lien will not attach if the inn-keeper knew the property taken in his custody was not owned by his guest, nor had any right to deposit it as bailee or otherwise, except perhaps some proper charge incurred against the specific chattel.

In Broadwood v. Granara, 10 Exch. 417, the inn-keeper knew that the piano sent to the guest did not belong to him, and did not receive it as a part of the guest's goods; and it was on that ground alone he was held not entitled to his lien. But in Threfall v. Borwick, L. R., 7 Q. B. 210, where the inn-keeper had received the piano as part of the goods of his guest, it was held he had a lien upon it. Miller, J., said: "When, having accom-

modation, he has received the guest with his goods and thereby has become liable for their safe custody, it would be hard if he was not to have a lien upon them. And under such circumstances, the lien must be held to extend to goods which he might possibly have refused to receive."

Lusk, J., said: "I am of the same opinion. The inn-keeper's lien is not restricted to such things as a travelling guest brings with him in journeying; the contrary has been laid down long ago. It extends to all goods the guest brings with him and the inn-keeper receives as his. If he has this lien as against the guest, the cases have established beyond all doubt that he has the same right as against the real owner of the article, if it has been brought to the inn by the guest as owner." To the same effect, Quain, J., said: "There is no authority for the proposition that the lien of the inn-keeper only extends to goods which a traveller may be ordinarily expected to bring with him. * * * The liability, as shown by the old cases, extends to all things brought to the inn as the property of the guest and so received, even a chest of charters or obligations; and why not a pianoforte? If therefore the inn-keeper be liable for the loss, it seems to follow he must also have a lien upon them. And if he has a lien upon them as against the guest, the two cases cited (and there are more) show that if the thing be brought by the guest as owner, and the landlord takes it thinking it is the guest's own, he has the same rights against the stranger, the real owner, as against the guest." Upon appeal from the decision of this case, in Threfall v. Borwick, L. R., 10 Q. B. 210, it was held, affirming the decision, that whether the defendant, as inn-keeper, was bound to take in the piano or not, having done so, he had a lien upon it. Although there are certain dicta not necessary to the decision in Broadwood v. Granara, 10 Exch. 417, to the effect that the inn-keeper was not bound to receive the piano, yet the real ground of the decision was based on the fact that the inn-keeper knew that the piano sent to his guest was the property of a third person, and did not therefore receive it as part of his guest's goods, that the right to subject the piano to his lien was denied; but *e converso,* if he had not known the piano was the property of a third person, and had received it as the property of his guest, would not his lien have attached? It is not material whether the inn-keeper is bound to receive

such property, or not, although it is said the liability may be well extended, according to the advanced usages of society; yet if he does receive as the property of his guest, and thereby becomes liable for it, he must be entitled to his lien. Threfall v. Borwick, supra.

Whenever by virtue of the relation of inn-keeper and guest, the law imposes this extraordinary responsibility for the goods of the guest, it gives the inn-keeper a corresponding security upon the goods put by the guest into his possession. It is true that the piano was shipped to the defendant in his name, but he brought it to the inn as his property, or at least it was brought there at his request and upon his order, and put in the custody and possession of the plaintiff as the property of his guest. It is admitted that the plaintiff received it as an inn-keeper, and safely kept it as the property of his guest; nor is it doubted but that he would have been liable for its loss; and in such case, it is difficult to perceive upon what principle of law or justice he can be denied his lien. The judgment must be affirmed.

Judgment affirmed.

Goods Which Innkeeper Knows Are in Wrongful Possession of Guest.

JOHNSON v. HILL.

3 Starkie 172 (Eng.). 1822.

Trover for a cart and horse. It appeared that as the servant of the plaintiff was driving his cart in the neighborhood of Highgate, the name of the plaintiff having, by accident, fallen from the cart, a person, of the name of Pritchard, took the cart and horse to an inn kept by the defendant in the neighborhood. Pritchard had some refreshment at the defendant's house and directed the horse to be put in defendant's stable. He then sent the plaintiff's servant to his master with a note, requiring the payment of the sum of 40s. for not having his name on the cart. The servant returned with a refusal, and demanded the horse and cart, both from Pritchard and also from the defendant separately, but they both refused to give up the cart and horse.

A few days afterwards the parties appeared before a magistrate upon a complaint lodged by Pritchard, for not having the owner's name upon the cart, and the complaint was dismissed, and the defendant offered to restore the horse and cart to the plaintiff on being paid the sum of 10s., for the keep of the horse up to that time. This, however, the plaintiff refused to pay, and afterwards brought the present action, without any tender in respect of the keep of the horse.

On the part of the plaintiff it was insisted that the defendant had, under the circumstances, no lien on the horse for the charge of keeping him. Pritchard was a wrong-doer in seizing the horse and cart, as the highway act did not authorize any seizure for omitting to place an owner's name on a cart, and the defendant was equally a wrong-doer in detaining the property.

Scarlett, for the defendant, insisted that he was entitled to be paid for the horse's keep, notwithstanding any illegality on the part of Pritchard. It had been held by all the judges, that even in the case of where a robber had brought a horse which he had stolen, to an inn, the inn-keeper was entitled to receive compensation from the owner before the latter could insist upon a redelivery to himself.

ABBOTT, L. C. J., said that he had no doubt as to the law as stated; but that the question was, whether the defendant knew, at the time when the horse was delivered into his custody, that Pritchard was not the owner of the property, but a mere wrong-doer; if he knew that fact, he made himself a party to the wrongful act of Pritchard, and could not insist on any recompense for keeping the horse.

The defendant's counsel then addressed the jury, insisting that there was no sufficient evidence to show that the defendant was at all cognizant of the previous circumstances.

Abbott, L. C. J., left it to the jury, according to the opinion already given, to say, whether they could infer a knowledge on the part of the defendant that Pritchard was a wrong-doer, there being no evidence of the fact.

Verdict for the plaintiff, damages 15£.

LEADING ILLUSTRATIVE CASES
LAW OF AGENCY

CHAPTER I.

INTRODUCTION.

Agency Distinguished from the Relation of Master and Servant.

WAKEFIELD ET AL. v. FARGO.

90 New York 213. 1882.

Action brought to enforce the claim of an alleged laborer or servant of The High Rock Congress Spring Company, a corporation, against defendant as a stockholder in said corporation, said action being based upon the statute mentioned in the opinion.

DANFORTH, J. We agree with the General Term in the conclusion that The High Rock Congress Spring Company was organized under the act of 1863, chapter 63, entitled "An act to extend the operation and effect of the act passed February 17, 1848, entitled 'An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes,'" and that by the provisions of § 2, the stockholders composing it became subject to the liabilities imposed by § 18 of the original act, and therefore "liable for all debts that may be due and owing to their laborers, servants and apprentices for services performed for such corporation."

We also agree with that court in the opinion that the appellant, Judson, was, as between himself and the creditors of the corporation, a stockholder, and so within the purview of that section. He held the certificate of stock, and the books of the company disclosed this to be his relation to it. By admissions

in the pleadings, the other appellants occupy the same position. But there is error in the judgment to the extent of the "Clark" claim. He was not, within the meaning of the act, a "laborer, servant or apprentice." It is true he is characterized in the findings, in general terms, as both "laborer" and "servant," but specifically is described as the "bookkeeper and general manager" of the company, and his duties accord therewith. He kept an account of all the receipts and disbursements of the company, and, in the absence of the superintendent, had the charge and control of its business. He "worked by the year," was employed at a yearly salary of $1,200, and it is an indebtedness so created which has been allowed in this action.

A stockholder is not liable for the general debts of a corporation, if the statute creating it has been complied with. The clause in question creates a privileged class, into which none but the humblest employes are admitted, and the distinction which in practical life is easily discernible between president, director, officer, agent and laborer, at once disappears in the face of such a judgment as we have before us. Clearly a distinction is made by the statute. The stockholders must pay, not debts due to all employes of the company, but those due to "laborers, servants and apprentices," and not all debts due to them, but only such as are due for "services" performed for such corporation. It is plain, we think, that the services referred to are menial or manual services—that he who performs them must be of a class whose members usually look to the reward of a day's labor or service for immediate or present support, from whom the company does not expect credit, and to whom its future ability to pay is of no consequence; one who is responsible for no independent action, but who does a day's work, or a stated job, under the direction of a superior (Gordon v. Jennings, L. R. 9 Q. B. Div. 45; Dean v. DeWolf, 16 Hun 186, affirmed, 82 N. Y. 626). Such persons are described in the common law, in terms adopted, as is reasonable to suppose, in the statute before us. Speaking of master and servant, Blackstone (B. 1, chap. 14) says: "The first sort of servants acknowledged by the law of England are menial servants. Another species of servants are called apprentices. A third species of servants are laborers, who are only hired by the day or the week." He also speaks of "stewards, factors, and bailiffs," as perhaps constituting a fourth class.

But this, doubtingly, "because they serve in a special, ministerial capacity," and in view of the declarations already made by this court as to the object of the statute (Coffin v. Reynolds, 37 N. Y. 640; Gurney et al. v. Atlantic & Great Western Railway Co. et al., 58 Id. 358; Akin, Administrator, v. Wasson, 24 Id. 482; Stryker v. Cassidy, 76 Id. 50, 32 Am. Rep. 262), it may be added that as such individuals occupy positions, and are usually of such capacity as enables them to look out for themselves, they are not within the privilege of the statute. To the language of the act must be applied the rule common in the construction of statutes, that when two or more words of analogous meaning are coupled together, they are understood to be used in their cognate sense, express the same relations, and give color and expression to each other. Therefore, although the word "servant" is general, it must be limited by the more specific ones, "laborer and apprentice," with which it is associated, and be held to comprehend only persons performing the same kind of service that is due from the others. It would violate this rule to hold that the intermediate, or second class, represented a higher grade than the class first named.

A general manager is not ejusdem generis with an apprentice or laborer; and although in one sense he may render most valuable service to the corporation, he would not in popular language be deemed a servant. The word used is no doubt broad enough, and might, without exaggeration, represent all persons connected with the administration or furtherance of the affairs of a corporation; in this instance, from the one who dips or bottles the water, to the president, but this would manifestly be too general. "Laborer or apprentice" are words of limited meaning, and refer to a particular class of persons employed for a defined and low grade of service performed, as before suggested, without responsibility for the acts of others, themselves directed to the accomplishment of an appointed task under the supervision of another. They necessarily exclude persons of higher dignity, and require that one who seeks his pay as servant, should be of no higher grade than those enumerated as laborers or of lesser quality. A statute which treats of persons of an inferior rank cannot by any general words be so extended as to embrace a superior; the class first mentioned is to be taken as the most comprehensive, "specialia generalibus derogant."

(Blackstone's Intro., § 3; Sandiman v. Breach, 7 B. & C. 96; Reg. v. Cleworth, 4 B. & S. 927; Kitchen v. Shaw, 6 A. & E. 729; Branwell v. Penneck, 7 B. & C. 536; Williams v. Goldwig, L. R. 1 C. P. 69; Broom's Maxims, 625; Smith v. People, 47 N. Y. 337. Allen, J.)

The decisions already made by us and above cited also seem to exclude the claim in question. No two cases are alike, but the principle on which the ones referred to were decided, control here. On the other hand, the respondent brings to our attention Hovey v. Ten Broeck, 3 Rob. 316, where a conclusion was reached that the plaintiff, "a man of all work," who had a complete supervision of the property, men and business of the company, who also kept their books, and was to receive for his services, at the rate of $500 per annum, was as to some matters a laborer, and others a servant, upon the ground that as laborer he performed manual work, and at other times as "servant" rose above it; when he did that we think he went beyond the statute. The word "servant" must be construed by its associates. It stands between "laborer" and "apprentice," and can represent no higher degree of employment. In Kincaid v. Dwinelle, 59 N. Y. 548, also cited, the question was not presented.

The claim of Clark was improperly allowed.

CHAPTER II.

FORMATION OF THE RELATION OF PRINCIPAL AND AGENT.

How an Agent May Be Appointed—By Will of the Principal, Express or Implied.

POLE v. LEASK.

33 Law Journal Reports, Eq. 155 (Eng.). 1863.

LORD CRANWORTH. My lords, before I examine in detail the facts of this case, I desire to advert very shortly to one or two general propositions connected with the law of agency, which, I think, were sometimes lost sight of in the argument of this case at your lordships' bar. First, then, as to the constitution by the principal of another to act as his agent. No one can become the agent of another person except by the will of that other person. His will may be manifested in writing or orally, or simply by placing another in a situation in which, according to ordinary rules of law, or perhaps it would be more correct to say, according to the ordinary usages of mankind, that other is understood to represent and act for the person who has so placed him; but, in every case, it is only by the will of the employer that an agency can be created.

This proposition, however, is not at variance with the doctrine, that where one has so acted as from his conduct to lead another to believe that he has appointed some one to act as his agent, and knows that that other person is about to act on that behalf, then, unless he interposes, he will, in general, be estopped from disputing the agency, though in fact no agency really existed. It is, however, necessary to bear in mind the difference between this agency by estoppel, if I may so designate it, and a real agency, however constituted.

Another proposition to be kept constantly in view is, that the burden of proof is on the person dealing with any one as an agent, through whom he seeks to charge another as principal.

He must show that the agency did exist, and that the agent had the authority he assumed to exercise, or otherwise that the principal is estopped from disputing it.

Unless this principle is strictly acted on, great injustice may be the consequence; for, any one dealing with a person assuming to act as agent for another, can always save himself from loss or difficulty by applying to the alleged principal to learn whether the agency does exist, and to what extent. The alleged principal has no similar mode of protecting his interests; he may be ignorant of the fact that any one is assuming to act for him, or that persons are proposing to deal with another under the notion that that other is his agent. It is, therefore, important to recollect constantly where the burden of proof lies. * * *

Who May Be an Agent.

LYON & CO v. KENT, PAYNE & CO.

45 Ala. 656. 1871.

Kent, Payne & Co., the plaintiffs, were residents of Richmond, Va., on January 17, 1865, and owned certain cotton which was in the custody of their agent in Alabama. On the above-mentioned date they gave to James W. Singleton, a citizen of Illinois, an order on said agent for all the cotton belonging to them in his hands. Singleton sold the cotton to one Guy, who stored it with Lyon & Co., defendants herein. Plaintiffs bring this action of detinue for the cotton, alleging that the order given to Singleton was given simply to enable him to take possession of the cotton as agent of plaintiffs and save it from confiscation as contraband goods. Defendants claim that the transfer to Singleton was absolute. There was judgment for plaintiffs and defendants appealed.

PETERS, J. The only negotiation that Singleton had with the firm of Kent, Payne & Co., touching the cotton, took place in January, 1865, at Richmond, Virginia. If there was a sale at all, or any contract entered into between Singleton, a citizen of Illinois, and Kent, Payne & Co., citizens of Virginia, by which any title or interest in the cotton was attempted to be passed from the one to the other, it was wholly void and incapable of

ratification. No trading between these parties was then allowable without a permit of the government. And the President's pass was not sufficient for that purpose: McKee v. United States, 8 Wall. 163, 166; The Ouachita Cotton, 6 Wall. 521, 531; Brown v. Tarkinton, 3 Wall. 377, 381; Kennett v. Chambers, 14 How. 38, 50. Then, the order alone warned all who looked upon it, who knew the domicile of the parties to it, that it could not be evidence of a legal title. And it was not, unconnected with other proof, a power to sell or dispose of the cotton.

Yet, though the order of itself was not evidence of a sale to Singleton, or a power to sell, it shows that the owners of the cotton had authorized him to take possession of it. This he could do as the agent of the owners. This was not forbidden to him or to them by law or the policy of the government. They could change the agency of the custody of their cotton from one person to another. And they could make any person, capable of acting as an agent, such agent to take possession of their property for them, and keep it for them. They could transfer its custody from Browder to Singleton without a violation of law. The objection which might be supposed to exist to such an agency during the war, ceased as soon as the war was ended; and its purpose being then legal, it might be legally consummated. Any one, except a lunatic, imbecile, or child of tender years may be an agent for another. It is said by an eminent author and jurist, that "it is by no means necessary for a person to be sui juris, or capable of acting in his or her own right in order to qualify himself or herself to act for others. Thus, for example, monks, infants, femes covert, persons attainted, outlawed or excommunicated, villains and aliens, may be agents for others": Story's Agency, §§ 6, 7, 9. So, a slave, who is homo non civilis, a person who is but little above a mere brute in legal rights, may act as the agent of his own or his hirer: Powell v. The State, 27 Ala. 51; Stanley v. Nelson, 28 Ala. 514. It was then, certainly not unlawful, or against the public policy of the nation, for Kent, Payne & Co. to keep their cotton, and keep it safely, during the late rebellion. It is the undoubted law of agency, that a person may do through another what he could do himself in reference to his own business and his own property; because the agent is but the principal acting in another name. The thing done by the agent is, in law, done by the

principal. This is axiomatic and fundamental. It needs no authorities to support it. Qui facit per alium, facit per se: Broom's Max., marg.; 1 Pars. Con., 5th ed., p. 39, et seq.; Story's Agency, § 440. And to this it may be added, that an agent dealing with the property of his principal, must confine his acts to the limit of his powers; otherwise, the principal will not be bound: 1 Pars. Con. 41, 42, 5th ed.; Powell v. Henry, 27 Ala. 612; Botts v. McCoy et al., 20 Ala. 578; Allen v. Ogden, 1 W. C. C. 174. And it is also the duty of one dealing with an agent to know what his powers are and the extent of his authority: Van Eppes v. Smith, 21 Ala. 317; Owings v. Hull, 9 Pet. 608. Then, the agency to receive the delivery of the cotton from Browder, in compliance with the order, was not illegal. If it went beyond that it was void. And those who dealt with Singleton were bound to know this as they were bound to know the law.

The judgment of the Court below is affirmed.

A Principal May Delegate His Authority to Do Any Act Which Is Not (1), Illegal, Immoral or Opposed to Public Policy, (2) Which Is Not Personal in Its Nature.

RICE v. WOOD.

113 Massachusetts 133, 18 Am. Rep. 459. 1873.

Action in contract to recover commissions as a broker. Defendant requested the court to charge that a broker acting for both parties cannot recover commissions from either, unless both knew of and assented to his double agency. The court, however, charged that he could recover from the party who had knowledge of it. Plaintiff recovered and defendant alleged exceptions.

DEVENS, J. In this case there was evidence at the trial in the court below that the plaintiffs had been employed by a third person, who had promised to pay them a commission therefor, to dispose of certain real estate, and that afterward, without the knowledge of such person, an agreement was made between the plaintiffs and the defendant, by which the plaintiffs were employed to act for the defendant in the exchange of certain stocks held by him for real estate, and were promised a commission if such exchange should be effected, the defendant know-

ing at the time that the plaintiffs were employed for a commission to sell such real estate; and further, that afterward the plaintiffs introduced the defendant to the owner of such real estate and by the instrumentality of the plaintiffs the exchange of defendant's stock for such real estate was effected.

If this were an action by the plaintiffs against the owner of the real estate, for commissions earned in disposing thereof, the decision of this court in Farnsworth v. Hemmer, 1 Allen (Mass.) 494, would be exclusive against the claim, upon the ground that the plaintiffs, if such facts should be proved, had entered into a relation inconsistent with the confidence reposed in them by such owner, and placed themselves in a position antagonistic to his interests. This case presents, however, the question whether, conceding that the plaintiffs could not recover their commissions from the owner of the real estate, they may not recover those they claim to be entitled to from the defendant, as he knew fully, at the time of entering into his contract, the relation in which the plaintiffs stood to the third party. It was the duty of the plaintiffs to get the highest price for the real estate that could be obtained for it in the market; while the contract between the plaintiffs and the defendant was an inducement to the plaintiffs to effect a sale to the defendant, even if it was on lower terms than might have been obtained from others, because they thereby secured their commissions from both parties. It was therefore an agreement which placed the plaintiffs under the temptation to deal unjustly with the owner of the real estate. Walker v. Osgood, 98 Mass. 348. Contracts which are opposed to open, upright and fair dealing are opposed to public policy. A contract by which one is placed under a direct inducement to violate the confidence reposed in him by another is of this character. If the plaintiffs were guilty of injustice to the owner of the real estate, by placing themselves under an inducement to part with it at less than its full market value, they should not be allowed to collect the promised commissions on the sale of the stock, which was the consideration for which they put themselves in such a position. No one can be permitted to found rights upon his own wrong, even against another also in the wrong. A promise made to one in consideration of doing an unlawful act, as to commit an assault or to practice a fraud upon a third person, is void in law; and the law will not only

avoid contracts the avowed purpose or express object of which is to do an unlawful act, but those made with a view to place, or the necessary effect of which is to place a person under wrong influences, and offer him a temptation which may injuriously affect the rights of third persons. Nor is it necessary to show that injury to third persons has actually resulted from such a contract, for in many cases where it had occurred this would be impossible to be proved. The contract is avoided on account of its necessarily injurious tendency. Fuller v. Dame, 18 Pick. (Mass.) 472. We are of opinion, therefore, that the judge who presided at the trial erred in the instruction given, and that the defendant was entitled to an instruction substantially like that asked for. Nor can the ruling be sustained upon the ground suggested at the bar, that the plaintiffs were middle-men only, bringing the parties together and doing nothing further, the parties themselves making the contract. In Rupp v. Sampson, 16 Gray (Mass.) 398, the plaintiff was permitted to recover, not for services rendered to the defendant as a broker, but for the performance of a certain specific act, namely, the introduction of the other party to him, the parties after such introduction making their own contract. It was there held that this was not such a fraud upon the other party, who also paid for the service of the plaintiff in introducing him, although concealed from such party, as to make the contract of the plaintiff with the defendant void for illegality. That, however, is not the present case.

It here appears, by the bill of exceptions, not only that there was evidence that the plaintiffs introduced the parties, but that, through the instrumentality of the plaintiffs, the exchange was effected, and that in effecting such exchange the plaintiffs acted as brokers for both parties. It is to be observed, also, that both the instructions asked for by the defendant and those given by the presiding judge proceed upon the ground that the plaintiffs were brokers and not middle-men only.

Exceptions sustained.

KNAUSS v. GOTTFRIED KRUEGER BREWING COMPANY.

142 N. Y. 70. 1894.

Action to recover the reasonable value of service rendered by plaintiff in regard to the sale of the brewery owned by defendant.

The plaintiff was employed by the buyer and the seller. He brought the parties together and they, without his aid, negotiated the sale.

PECKHAM, J. This action was brought to recover for services alleged by plaintiff to have been performed by him for defendant in regard to the sale of the brewery owned by the defendant, to one Robert Bliss or his assignee.

The answer put the employment in issue and denied that any service had been performed by, or that any sum was due to, the plaintiff touching the subject of such sale. The complaint was dismissed upon the trial and the General Term has affirmed the judgment of dismissal.

Upon looking through the record containing the evidence given on the trial it is clear that the admission made by counsel for respondent in his brief, "that the action was, in fact, tried upon the evidence in disregard to the pleadings," has a good deal of support. We think it is too late to claim that the plaintiff must be judged entirely by his complaint, as if it had alleged his employment by defendant as a broker in the strict sense of the word, to obtain a purchaser of the brewery upon terms in regard to which he had some discretion. His evidence upon the subject given at the trial does not prove any such contract, and there was no evidence given which contradicted him. It showed that he was claiming compensation from the defendant because of his having introduced the president of the defendant to Mr. Bliss, with whom or with whose assigns the defendant subsequently completed a sale of the brewery for the sum of $1,822,000.

It is our duty to review the case in the light of the evidence given for the plaintiff, and if there were evidence of any employment substantially within the general scope of the allegations of the complaint, we think it should have been submitted to the jury, unless there were some other fact which also appeared and which constituted a defense to the action. The record shows there was evidence of the employment of the plaintiff for the mere purpose of bringing the possible buyer and seller together, and with the understanding that if a sale were to result the plaintiff was to have some compensation from the defendant for his services. The plaintiff testified that he was to have nothing to do with fixing the price or the terms of sale; the principals

were to do that part of the business; all he had to do was to bring them together, and if through their subsequent negotiations a sale should result, the plaintiff was to be entitled to some compensation. The real defense which is sought to be maintained is that while acting for the defendant in a matter in which trust and confidence were reposed in him, and where defendant relied upon his unbiased judgment, the plaintiff was at the same time, but unknown to the defendant, in the employment of the proposed purchaser and bound by his duty to such purchaser to do all he could to forward the interests of the purchaser as against the seller. There was another defense interposed upon the trial which consisted of a New Jersey statute relating to brokers selling real estate and which probibited them from claiming commission unless their authority for selling was in writing. The brewery which was the subject of sale in this case was situated in New Jersey and it was urged that the statute applied to the contract proved.

On this point we are of opinion that the statute has no application. It in terms refers to those brokers who are themselves authorized to make the sale or exchange of the lands, and here the proof is uncontradicted that the plaintiff had no such authority.

Upon the other question we think the defendant is clearly right as to the law, but we also think there is nothing in the evidence to make it applicable here.

We agree perfectly with the cases of Carman v. Beach (63 N. Y. 97) and Murray v. Beard (102 id. 508). The cases upon the subject are also collected in the late one of Empire State Insurance Co. v. American Central Ins. Co. (138 N. Y. 446). It is undeniable that where the broker or agent is invested with the least discretion, or where the party has the right to rely on the broker for the benefit of his skill or judgment, in any such case an employment of the broker by the other side in a similar capacity, or in one where by possibility his duty and his interest might clash, would avoid all his right to compensation. The whole matter depends upon the character of his employment. If A. is employed by B. to find him a purchaser for his house upon terms and conditions to be determined by B. when he meets the purchaser, I can see nothing improper or inconsistent with any duty he owes B. for A. to accept an employment from C.

to find one who will sell his house to C. upon terms which they may agree upon when they meet. And there is no violation of duty in such case in agreeing for commission from each party upon a bargain being struck, or in failing to notify each party of his employment by the other.

Now, this, in substance, is what, according to the plaintiff's evidence, he contracted to do with these parties. He was employed by Bliss to see if he could not obtain customers who would sell their breweries upon terms to be agreed upon by the principals themselves, and he was employed by defendant to introduce its president to someone who wished to purchase, but the terms and all else regarding the contract were to be agreed upon between defendant and the purchaser. There is a piece of evidence which defendant claims is fatal to this view, and shows that the plaintiff violated his duty in concealing or in not mentioning his position with regard to Bliss. When the plaintiff came to the president of the defendant for the purpose of entering upon a discussion of the business and to learn whether he was desirous of selling, the plaintiff was inquired of by the president as to the responsibility of the parties the plaintiff spoke of as desiring or proposing to purchase, for it was said by the president that he did not care to go on with the matter or present it to the others unless he knew they (the persons mentioned by plaintiff) were responsible parties. The plaintiff says he assured the president that they were responsible. From that interview others followed, and finally the plaintiff introduced the president to Mr. Bliss, and the negotiations were thereafter conducted between them and lasted for quite a long time (a number of weeks) before they finally resulted in a sale effected upon terms made up and agreed upon entirely between the parties, without the slightest aid from, or interference on the part of, the plaintiff.

The defendant urges that the statement of plaintiff that the parties who were intending purchasers were responsible, was a statement upon which defendant was entitled to rely and to think that the plaintiff was giving the defendant the benefit of his own honest judgment uninfluenced by any concealed interest of his own in having the sale accomplished. We think this is an erroneous view of the situation. It is clear that the remark of the plaintiff in reference to the question of defendant's presi-

dent was merely incidental, and that the question itself was in reality wholly beside the main question of sale. It was plainly an interrogatory for the purpose of learning in substance whether it was worth while to take the subject into consideration or whether it might not be mere irresponsible talk by men who had not the slightest intention or even power to carry out a sale. It had no bearing and was not asked for the purpose of obtaining knowledge upon the question whether or not to make a sale, or the terms or conditions of the sale if one were to be made. No reliance was placed upon the statement as a foundation for any condition of any contract subsequently made, nor was the question asked for any such purpose. This, we think, is apparent from the nature of the question and the circumstances under which it was asked and the facts that subsequently occurred. On its face the question manifestly had nothing to do with the subsequent transactions or with the material facts in the case. It was entirely preliminary in its nature and purpose. The answer might have determined the defendant's president to see the parties and then to make up his own opinion as to whether to go on or not, and as to the terms and conditions of the sale to be made.

The case differs so widely from that of Holcomb v. Weaver (136 Mass. 265) that we cannot think it necessary to lengthen this opinion by referring to all the material facts in the case cited. In regard to the subject of the double employment, if it be of a nature where by possibility the interests of the parties may be diverse, we agree that it cannot be upheld if concealed from knowledge. There is nothing of that kind appearing in the contract or agreement with either party as testified to by plaintiff. The fact that the sale was afterwards arranged between the parties exclusively upon terms and conditions agreed upon between them and without any reference to any previous statement of plaintiff, shows that it was wholly immaterial, and was not put or answered upon any supposition that it could or would in any manner influence the conduct of the defendant after entering upon the negotiations. The defendant claims the sale was not in fact made to Bliss but to a third party. We think the evidence shows the sale was effected between the parties as contemplated in the contract, and that upon such sale the plaintiff became entitled to a reasonable compensation for the services

rendered. He admits in his evidence that the president never said to him what particular sum of money would be paid him, or what rate of commissions, and his compensation will have to be decided upon by the jury at a sum which shall be reasonable for the labor performed. All this has been said as to the case which the plaintiff made out upon the trial. The evidence for the defendant has not been heard, and, of course, no opinion is expressed or entertained as to the merits of the controversy. It is a question for the jury to determine after hearing both sides.

For that purpose the judgment should be reversed and a new trial granted, with costs to abide the event.

MILLS v. MILLS.

40 New York 543, 100 Am. Dec. 535. 1869.

Action for the specific performance of a contract to convey certain real estate, brought by William T. Mills against David S. Mills. The court below dismissed the complaint upon the ground that the contract relied upon was illegal and void. Plaintiff appeals.

HUNT, C. J. The question of the effect of agreements of this character has been recently considered in this court. Lyon v. Mitchell, 36 N. Y. 235, 93 Am. Dec. 502; see also the dissenting opinion of Judge Grover at page 682. The agreement in question is founded upon an undertaking on the part of the plaintiff, reciting that a bill was pending in the Senate, which granted unto the plaintiff a certain railroad franchise in the city of Brooklyn, and promising "to give all the aid in his power, spend such reasonable time as may be necessary, and generally to use his utmost influence and exertions to procure the passage into a law of the bill heretofore introduced into the Senate of the State of New York." It was further agreed that the said bill should be so amended as to limit the grant herein to the parties to this agreement; or that it should be amended as, from time to time, should be agreed by the said parties and, when passed, the right should be transferred to David S. The plaintiff further agreed that he would not "co-operate or conspire" with any other per-

son, or give any aid or countenance to the introduction into the legislature by any other person of a similar proposition.

It is not suggested that the plaintiff was a professional man, whose calling it was to address legislative committees. It is not suggested that he had any claim of right, which he proposed to advocate, and which right or debt he proposed to transfer to the defendant. He had simply asked of the legislature the privilege or favor to be granted to him of building and operating a railroad upon certain streets of the city of Brooklyn. This privilege may be assumed to be of pecuniary value. To procure the passage of such a law for the benefit of the defendant, he undertook to use his utmost influence and exertions. This contract is void as against public policy. It is a contract leading to secret, improper and corrupt tampering with legislative action. See Lyon v. Mitchell, supra, and cases cited; see, also, Fuller v. Dame, 18 Pick. (Mass.) 479; Sedgwick v. Staunton, 14 N. Y. 289; Frost v. Belmont, 6 Allen (Mass.) 159; Powers v. Skinner, 34 Vt. 281, 80 Am. Dec. 677. It is not necessary to adjudge that the parties stipulated for corrupt action, or that they intended that secret and improper resorts should be had. It is enough that the contract tends directly to those results. It furnishes a temptation to the plaintiff to resort to corrupt means or improper devices to influence legislative action. It tends to subject the legislature to influences destructive of its character, and fatal to public confidence in its action. Clippinger v. Hepbaugh, 5 Watts & S. (Penn.) 315, 40 Am. Dec. 519; Fuller v. Dame, supra.

The case was correctly decided, and the judgment should be affirmed.

Meaning of Ratification in Agency.

McCRACKEN v. CITY OF SAN FRANCISCO.

16 California 591. 1860.

FIELD, C. J. * * * To ratify is to give validity to the act of another. A ratification is equivalent to a previous authority. It operates upon the act ratified in the same manner as though the authority had been originally given. It follows, as a consequence, that where the authority can originally be con-

ferred only in a particular form or mode, the ratification must follow the same form or mode. Thus, if an authority to execute a deed of a private person must be under seal, the ratification of the deed must be also under seal; and where an authority to do any particular act on the part of a corporation can only be conferred by ordinance, a ratification of such acts can only be by ordinance. It follows, also, from the general doctrine, that a ratification is equivalent to a previous authority, that a ratification can only be made when the principal possesses at the time the power to do the act ratified. He must be able, at the time, to make the contract to which, by his ratification, he gives validity. The ratification is the first proceeding by which he becomes a party to the transaction, and he cannot acquire or confer the rights resulting from that transaction, unless in a position to enter directly upon a similar transaction himself. Thus, if an individual, pretending to be the agent of another, should enter into a contract for the sale of land of his assumed principal it would be impossible for the latter to ratify the contract if, between its date and the attempted ratification, he had himself disposed of the property. He could not defeat the intermediate sale made by himself, and impart validity to the sale made by the pretended agent, for his power over the property or to contract for its sale would be gone. So, also, contracts made upon an assumed agency for a single woman cannot be ratified by her after marriage, without the consent of her husband, for her power to contract alone ceases with her marriage. * * *

When Acts May Be Ratified—Forgery—That It Cannot Be Ratified.

WORKMAN v. WRIGHT.

33 Ohio St. 405. 1878.

WRIGHT, J. Under the pleadings and findings of the court below, it may be assumed that the name of Calvin Wright was a forgery, as there was evidence tending to show the fact, and we cannot say that the conclusion reached, in this respect, was clearly against the testimony. It is claimed, however, that his admissions, and promises to pay the note, ratified the unauthorized signatures.

Had Workman, the owner of the note, taken it upon the faith of these admissions, or had he at all changed his status by reason thereof, such facts would create an estoppel, which would preclude Wright now from his defense. This appears from most of the authorities cited in the case. But no foundation for an estoppel exists. All these statements of Wright, whatever they were, were made after Workman became the owner of the paper. Workman did not act upon them at all; he was, in no way, prejudiced by them, nor did they induce him to do, or omit to do, anything whatever to his disadvantage. But it is maintained that, without regard to the principle of estoppel, these admissions and promises are a ratification of the previously unauthorized act, upon the well-known maxim, Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.

It is said, that a distinction exists between the classes of cases to which this principle applies. Where the original act was one merely voidable in its nature, the principal may ratify the action of his agent, although it was unauthorized. But where that act was void, as in case of a forgery, it is said no ratification can be made, independent of the principle of estoppel, to which we have alluded. Most of the authorities, cited by counsel for plaintiff in error, are of the first class, where the act was only voidable.

Bank v. Warren, 15 N. Y. 577, was where one partner, without authority, and for his own exclusive benefit, indorsed his own note in the firm name, his co-partner was held bound by a subsequent promise to pay it, without any independent consideration.

In Crout v. DeWolf, 1 R. I. 393, the third clause of the head note is, "Where the person, whose signature is forged, promises the forger to pay the note, this amounts to ratification of the signature, and binds him." But an examination of the case shows that evidence was offered to prove that plaintiff had bought the paper in consequence of what defendant said to him, and the Court charged that, if before purchasing the note, plaintiff asked defendant if he should buy, and he was told he might, defendant could not excuse himself on the ground of forgery. So that the case may be put upon the ground of estoppel, without relying upon the ground stated in the head note quoted.

Harper v. Devene, 10 La. An. 724, was where a clerk of a house signed the name of the house by himself as agent. Defendant, a member of the house, afterward took the note, corrected its date, and promised to pay it; and this was held a ratification to make him liable. In this case, and many like it, it may be remarked that the agent assumed to have authority, and does the act under that belief; but in case of a forgery, there is no such authority and no such belief.

The case of Forsythe v. Day, 46 Me. 177, involves the principle of estoppel.

The cases of Bank v. Crafts, 4 Allen 447, and Howard v. Duncan, 3 Lansing 175, sustain the views of plaintiff in error, holding that a forgery may be ratified, independently of the principle of estoppel, and in the absence of any new consideration for the ratifying promise—a conclusion, however, to which we cannot agree.

The case in 3 Lansing is criticised in 3 Albany Law Journal, 331.

Upon the other hand, there are authorities holding that a forgery cannot be ratified. There is a fully considered case in the English Exchequer: Book v. Hook, 3 Albany Law Jour. 255; 24 Law Times 34. This was a case where defendant's name was forged, and he had given a written memorandum, that he would be responsible for the bill. Chief Baron Kelly places his opinion upon the grounds: 1. That defendant's agreement, to treat the note as his own, was in consideration that plaintiff would not prosecute the forger; and 2. That there was no ratification, as to the act done—the signature to the note was illegal and void. And though a voidable act may be ratified, it is otherwise when the act is originally, and in its inception, void. The opinion fully recognizes the proposition, that where acts or admissions alter the condition of the holder of the paper the party is estopped, but it is necessary that such a case should be made.

It is further held, that cases of ratification are those where the act was pretended to have been done for or under the authority of, the party sought to be charged, which cannot be in case of a forgery. A distinction is also made between civil acts, which may be made good by subsequent recognition, and a criminal offense, which is not capable of ratification. Baron

Martin did not concur. In Woodruff & Robinson v. Monroe, 33 Md. 147, this is held: "If, in an action against an indorser of a promissory note by the bona fide holders thereof, it be shown that the indorsement was not genuine, and the defendant did not ratify or sanction it prior to the maturity of the note and its transfer to plaintiff, he is not liable. But if he adopted the note prior to its maturity, and by such adoption assisted in its negotiation, he would be estopped from setting up the forgery in a suit by a bona fide holder. But any admissions, by the defendant, made subsequently to the maturity of the note, would not be evidence that he had authorized the indorsement of his name thereon." See, also, Williams v. Bayley, L. R., 1 Appeals, H. L. 200.

In McHugh v. County of Schuylkill, 67 Pa. St. 391, the defense to a bond was forgery. The court below charged that if the obligor subsequently approved and acquiesced in the forgery or ratified it, the bond was binding on him. It was held that, there being no new consideration, the instruction was error; also, that a contract infected with fraud was void, not merely voidable, and confirmation without a new consideration was nudum pactum. See, also, Negley v. Lindsay, 67 Pa. St. 427. Daniels recognizes this proposition: 2 Daniels Negotiable Instruments, § 1352.

Upon principle we cannot see how a mere promise to pay a forged note can lay the foundation for liability of the maker so promising, when the promise was made, it was, under the circumstances set forth in the record. In addition to the fact that there are no circumstances to create an estoppel, there was no consideration for the promise. Wright received nothing, and it is a simple nudum pactum. The consideration for a promise may be either an advantage to the promisor or a detriment to the promisee, but here neither exists. Wright had signed a note, and when the one in suit was shown him, said he would pay it, supposing it to be the one he had signed. He was an ignorant man who could not read writing, though he could sign his name, and when he saw the paper, seeing that the signature spelt his name, and being unable to read the body of the instrument, he said it was all right, and he would pay it. But the promise was without that consideration which would make it a binding contract. Judgment affirmed.

What Is a Sufficient Ratification?—Implied Ratification—An Agent's Act May be Ratified by Silence or by Any Conduct from Which an Intent to Ratify a Contract May Be Inferred.

HALL v. HARPER.

17 Ill. 82. 1855.

CATON, J. This was an action of replevin for a horse. The bill of exceptions shows that in the spring of 1852, a son of the plaintiff, about eighteen years of age, and who resided with him, exchanged the horse in question, which belonged to the plaintiff, with the defendant, for another horse. A few days before the exchange the plaintiff forbid his son to exchange the horse. After the exchange the son took the horse home to the plaintiff. The agreement to exchange was made on Saturday, and the exchange was made several days later. The son told his father, on the Saturday, the agreement which he had made to exchange, and it does not appear that the plaintiff expressly approved of or forbid the exchange. The witness does not seem to remember what his father said about it, only he says he knows his father did not tell him to make the exchange. Nor does it appear, from the son's testimony, that his father made any objections when he brought the horse home which he got of the defendant. The plaintiff was afterward seen riding the horse. A few days after the exchange, the plaintiff told the witness, Snyder, that if the horse which his son had swapped with the defendant for, "lived and lucked well, he would make a horse that would sell for more than the one his son had swapped to defendant." The parties lived about two miles apart, and met several times; and on one occasion the defendant rode the horse in controversy to the plaintiff's house, but nothing was said between them about the exchange of horses which had been made. Two or three weeks after the exchange had been made, the plaintiff was taken sick and remained ill till about the time this suit was commenced. After the exchange the son took the horse home to his father's, where he remained two or three months; at the expiration of which time the plaintiff took the horse back to the defendant and offered to return him, and demanded of the defendant the horse which his son had let him have. The

defendant refused to return him, whereupon this suit was brought.

From this evidence the jury was well warranted in finding that the plaintiff had acquiesced in and approved of the exchange of horses which had been made by his son, and thus adopted that act as his own. He did not repudiate the bargain which his son had made for the exchange when he was advised of it before the exchange was actually made, but passively allowed the executory bargain to be executed; and when his son brought the horse home he made no objections to the exchange, but retained and used the horse obtained of the defendant. He still forbore to remonstrate when he met the defendant several times subsequently, and even when the defendant rode the horse, which he had obtained of his son, to his house. It is plainly inferable, from the evidence, that he retained and treated the horse as his own for about three months, without a word of dissatisfaction or disapproval. An old and just legal maxim may well be applied to the plaintiff here, which says, if he keep silent when duty requires him to speak, he shall not be allowed to speak when duty requires him to keep silence. His continued silence and long apparent acquiescence in the act of his son, well justified the defendant in supposing that it met with his entire approval. He cannot be allowed to lay by and speculate on the chances of a good or a bad bargain, or upon the chances of the horse, procured of the defendant, turning out good or bad; or, to use his own expression, "lucking well." If he intended to repudiate the action of his son, he should have done so promptly, so that the defendant might know what he had to rely upon.

We think a different verdict would not have been justified by the evidence, and the judgment must be affirmed.

Judgment affirmed.

Consequences of Ratification—As Between the Principal and the Person with Whom the Pretended Agent Has Dealt.

DODGE v. HOPKINS.

14 Wisconsin 686. 1861.

This was an action to recover installments due upon a written contract under seal by which Dodge had agreed to sell Hopkins

certain lands which the latter agreed to buy and pay for in given installments, one of which was paid to the agent at the date of the contract. The contract was executed on the part of Dodge by an agent who assumed to act under a letter of authority from Dodge and his wife which had been executed in Spain. It was objected on the trial that the power of attorney was not so executed as to authorize the act of the agent. There was no evidence that defendant had at any previous time sought to repudiate the contract on this ground, but he sought to file a supplemental answer showing that since the commencement of suit he had tendered the money to an alleged agent of plaintiff and demanded the deed agreed upon. The supplemental answer was rejected. Judgment for plaintiff and defendant appealed.

DIXON, C. J. (After deciding that the supplemental answer was properly rejected because it did not appear that the agents had authority to accept the money or make the conveyance, and that the power of attorney was not sufficient to authorize the agent to execute the contract on the part of the plaintiff because as the power from Dodge and his wife was joint, it did not authorize a sale of the separate property of Dodge alone.) We are next to ascertain the effect of this want of authority upon the rights of the defendant. It is very clear, in the present condition of the case, that the plaintiff was not bound by the contract, and that he was at liberty to repudiate it at any time before it had actually received his sanction. Was the defendant bound? And if he was not, could the plaintiff, by his sole act of ratification, make the contract obligatory upon him? We answer both these questions in the negative. The covenants were mutual—those of the defendant for the payment of the money being in consideration of that of the plaintiff for the conveyance of the lands. The intention of the parties was that they should be mutually bound—that each should execute the instrument so that the other could set it up as a binding contract against him, at law as well as in equity, from the moment of its execution.

In such cases it is well settled, both on principle and authority, that if either party neglects or refuses to bind himself, the instrument is void for want of mutuality, and the party who is not bound cannot avail himself of it as obligatory upon the

other. Townsend v. Corning, 23 Wend. (N. Y.) 435; and Townsend v. Hubbard 4 Hill, (N. Y.) 351, and cases there cited. The same authorities also show that where the instrument is thus void in its inception, no subsequent act of the party who has neglected to execute it, can render it obligatory upon the party who did execute, without his assent. The opinion of Judge Bronson in the first named case is a conclusive answer to all arguments to be drawn from the subsequent ratification of the party who was not originally bound. In that case, as in this, the vendors had failed to bind themselves by the agreement. He says: "It would be most extraordinary if the vendors could wait and speculate upon the market, and then abandon or set up the contract as their own interests might dictate. But without any reference to prices, and whether the delay was long or short, if this was not the deed of the vendee at the time it was signed by himself and Baldwin (the agent), it is impossible that the vendors, by any subsequent act of their own without his assent, could make it his deed. There is, I think, no principle in the law which will sanction such a doctrine." The only point in which the facts in that case differ materially from those here presented, is that no part of the purchase money was advanced to the agent. But that circumstance cannot vary the application of the principle. The payment of the money to the agent did not affect the validity of the contract, or make it binding upon the plaintiff. He was at liberty to reject the money, and his acceptance of it was an act of ratification with which the defendant was in no way connected, and which, although it might bind him, imposed no obligation upon the defendant until he actually assented to it. It required the assent of both parties to give the contract any vitality or force.

I am well aware that there are dicta and observations to be found in the books, which, if taken literally, would overthrow the doctrine of the cases to which I have referred. It is said in Lawrence v. Taylor, 5 Hill (N. Y.) 113, that "such adoptive authority relates back to the time of the transaction, and is deemed in law the same to all purposes as if it had been given before." And in Newton v. Bronson, 3 Kern. (N. Y.) 594 (67 Am. Dec. 87), the court say: "That a subsequent ratification is equally effectual as an original authority, is well settled." Such expressions are, no doubt, of frequent occurrence, and

although they display too much carelessness in the use of language, yet if they are understood as applicable only to the cases in which they occur, they may be considered as a correct statement of the law. The inaccuracy consists in not properly distinguishing between those cases where the subsequent act of ratification is put forth as the foundation of a right in favor of the party who has ratified, and those where it is made the basis of a demand against him. There is a broad and manifest difference between a case in which a party seeks to avail himself, by subsequent assent, of the unauthorized act of his own agent, in order to enforce a claim against a third person, and the case of a party acquiring an inchoate right against a principal by an unauthorized act of his agent, to which validity is afterwards given by the assent or recognition of the principal. Paley on Agency, 192, note. The principal in such a case may, by his subsequent assent, bind himself, but, if the contract be executory, he cannot bind the other party. The latter may, if he choose, avail himself of such assent against the principal, which, if he does, the contract, by virtue of such mutual ratification, becomes mutually obligatory. There are many cases where the acts of parties, though unavailable for their own benefit, may be used against them. It is upon this obvious distinction, I apprehend, that the decisions which I have cited are to be sustained. Lawrence v. Taylor and Newton v. Bronson were both actions in which the adverse party claimed rights through the agency of individuals whose acts had been subsequently ratified. And the authorities cited in support of the proposition laid down in the last case [Weed v. Carpenter, 4 Wend. (N. Y.) 219; Episcopal Society v. Episcopal Church, 1 Pick. (Mass.) 372; Corning v. Southland, 3 Hill (N. Y.) 552; Moss v. Rossie Lead Mining Co., 5 Id. 137; Clark v. Van Riemsdyk, 9 Cranch. (U. S.) 153; Willinks v. Hollingsworth, 5 Wheat. (U. S.) 241], will, when examined, be found to have been cases where the subsequent assent was employed against the persons who had given it, and taken the benefit of the contract. * * *

Reversed.

CHAPTER III.

TERMINATION OF THE RELATION.

Termination by the Completion of the Purpose, or Expiration of the Time Set.

MOORE v. STONE.

40 Iowa 259. 1875.

MILLER, C. J. The evidence establishes the following state of facts: In the month of June, 1868, Mr. Scarlett applied to the plaintiff, who was then a member of the banking firm of Moore and McIntire, for the purpose of buying the land in controversy, if they had the agency. On being informed by plaintiff that they were not agents for the land, Scarlett said that Horace Everett, of Council Bluffs, was agent for the owner of the land. Plaintiff then examined and found the land in a printed list of lands for sale by Mr. Everett. Mr. Scarlett desired the plaintiff to buy the land for him at $5 per acre. The plaintiff said he was going to Council Bluffs in a short time, and would see Mr. Everett and try to make the purchase. In a few days after this the plaintiff did see Mr. Everett, and bargained for the land as Scarlett desired him to do. About two weeks after this Scarlett again called at the banking house of Moore & McIntire, did not find Moore in, but McIntire was there, and informed him that they had obtained the land for him. In a few days thereafter Scarlett called again and paid one-half the purchase-money for the land, and received a written contract for a deed upon the payment of the balance. Scarlett then inquired of plaintiff how much he charged for his services. "He said, usually $20, but in this case $10 would do," and Scarlett then paid the same.

The plaintiff resided in Page County, where the business was transacted; Scarlett resided and the land was situated in Taylor County. Some time in the month of July, 1869, a Mr. Farrell

called at the banking house of Moore & McIntire, and inquired if the deed to Scarlett for the land in controversy had been received by Moore & McIntire. He was told by them that it had not.

The deed was afterward received, being sent by Everett to Moore & McIntire's banking house, to be delivered by them to Scarlett on payment of the balance of the purchase-money. On the 27th of August, 1869, Farrell again called, and plaintiff delivered the deed to him on receipt of the money due, which was remitted to Everett. In delivering the deed and receiving the last payment on the land Moore and McIntire both testify they were acting as agents of Mr. Everett, whom they charged the usual collection fee of one-half of one per centum.

The evidence further shows that neither plaintiff nor McIntire had any knowledge, at the time they made the purchase for Scarlett, that there were any tax liens on the land. The firm of Moore & McIntire purchased the land at tax sale in October, 1868, and held the tax certificate at the time of the delivery of the deed to Scarlett, and did not make the fact known to him. In making such tax purchase this tract was not selected and purchased by itself, but was purchased at the same time with other lands as they were offered by the treasurer, regardless of the ownership, and without any inquiry, and paying no attention to the numbers, and at the time of the delivery of the deed to Scarlett they had no knowledge that they then held a certificate for the purchase of the land at tax sale, except what was common to all persons from the records. They then held certificates of the same kind for from ten to twenty thousand acres, and their attention was not particularly called to this tract until after the treasurer's deed came into the hands of the plaintiff.

Upon these facts it is quite clear that the agency of the plaintiff, or of Moore & McIntire, for the purchase of the land for Scarlett, terminated at the time they delivered to him the written contract for a conveyance of the land on receipt of the one-half of the purchase-money and the payment of their fees for the services performed. When this was accomplished Moore & McIntire had done all that they or the plaintiff had been employed to do. They had made the purchase as Scarlett had desired them to do, delivered to him the written contract sent

to them for Scarlett, received the first payment as per agreement. This completed the services they had undertaken. Scarlett himself so regarded it, for when these things were done he inquired how much they charged him for their services, and on being informed as to the amount he paid the same. They had performed the business for which the agency had been constituted, and, by operation of law, the agency was terminated. See Story on Agency, § 499, and cases cited; 2 Kent's Com. *643, and cases cited. This was in July, 1868. The purchase of the land at tax sale by Moore & McIntire was not made until October of that year. At that time they were as free to purchase the same as any other persons. Their agency no longer existed; they had not undertaken to procure a good title for Scarlett nor to examine the title for him. The land was situated in another county from where the plaintiff resided; nothing was said to them about the title, and they might well suppose that Scarlett, since he resided near the land and desired to buy it, had examined or procured some one to examine the records in the county where the lands were situated.

It is also quite clear that the fact that the deed to Scarlett was sent by Everett to the banking house of Moore & McIntire for the purpose of being delivered upon payment of the balance of the purchase-money, did not operate to revive the prior agency for the purchase of the land. In this transaction Moore & McIntire acted for and as agents of the grantor in the deed. There is no evidence that Scarlett procured the plaintiff, or his firm, to obtain the deed for him. On the contrary, it was sent by Everett to Moore & McIntire for the purpose of collecting the balance of the purchase-money then due. They performed that service for Everett and received their compensation from him.

It is equally clear that the plaintiff was not guilty of any fraud in failing to disclose the fact of the tax purchase by Moore & McIntire. Their relations were not such as required such disclosure to be made, especially when it is affirmatively shown that they had no actual knowledge that they held the certificate of purchase at the time they delivered the deed to Scarlett.

The decree of the Court below will be reversed, and a decree entered for plaintiff in this Court if he so elects, or the cause will be remanded for a decree to be entered in conformity with this opinion by the District Court. Reversed.

Termination by Operation of Law—Death of Principal or Agent.

WEBER v. BRIDGMAN.

113 New York 600. 1889.

Appeal from an order reversing a judgment in favor of the plaintiff.

In 1871, Weber executed to Hartwig a power of attorney, authorizing him, among other things, to collect and receive moneys becoming due from any person to his principal, and to execute discharges thereof, etc. Hartwig purchased a bond and mortgage, receiving an assignment thereof to Weber, and as agent collected the interest thereon as it fell due, receipting therefor in the name of Weber. The latter died in Germany in January, 1874. The bond fell due in May of that year and was paid by Bridgman, the then owner of the mortgaged premises, to Hartwig, who executed a satisfaction of the mortgage and delivered to the payor the bond and mortgage, the assignment and the power of attorney. Hartwig knew at the time of the death of Weber, but he did not disclose the fact to Bridgman, and the latter made no inquiries. In an action brought in 1885 to foreclose the mortgage, the court found that Hartwig never accounted to plaintiff, the widow and administratrix of Weber, for the bond and mortgage or the proceeds, and that plaintiff never assented to or ratified the payment, and did not know of the existence of the bond and mortgage or the cancellation thereof until within a short time of the commencement of the action.

DANFORTH, J. It should be assumed, without argument, that the plaintiff is not bound by the act of Hartwig, unless his authority to receive the money and discharge the mortgage was established, or unless she has, with knowledge of the facts, recognized that transaction and adopted it. The respondents' contention is that both alternatives are established, viz.: That the payment to Hartwig was a valid payment, and also that Hartwig accounted with the plaintiff and paid over to her the money so received by him. As Bridgman dealt with Hartwig as an agent, and now seeks to charge the representatives of Weber as if his dealings had been with the principal, the burden of proof was on

him to show either that the agency existed, and that the agent with whom he dealt had the authority he assumed to exercise or that the plaintiff is estopped from disputing it. That an agency of some kind did at one time exist in favor of Hartwig was sufficiently manifest by the power of attorney and proof of its due execution and delivery by Weber. If it be conceded that the act in question was within the authority which Hartwig once had, it would not aid the defendant, for that authority was determined by the death of Weber before the act was performed, and although Bridgman had no notice of his death the act was void and the estate of the principal is not bound.

The question is not new, and it has been uniformly answered by our decisions to the effect that the death of the principal puts an end to the agency, and, therefore, is an instantaneous and unqualified revocation of the authority of the agent. 2 Kent's Com. 646; Hunt v. Rousmanier, 8 Wheat. 174 (post, p. 322).

There can be no agent where there is no principal. There are, no doubt, exceptions to the rule, as where an agency is coupled with an interest (Knapp v. Alvord, 10 Pai. 205, 40 Am. Dec. 241 (ante, p. 328; Hunt v. Rousmanier, supra; Hess v. Rau, 95 N. Y. 359); or where the principal was a firm and only one of its members died. Bank v. Vanderhorst, 32 N. Y. 553. But both cases recognize the general rule to be as above stated. In Davis v. Windsor Savings Bank (46 Vt. 728), the rule was applied. The defendant paid money to the agent after the death of his principal, but in ignorance of it, and the administrator of the deceased recovered. It is quite unnecessary to go through the cases on this subject. The rule at common law which determines the authority of an agent by the death of his principal is well settled, and no notice is necessary to relieve the estate of the principal of responsibility, even on contracts into which the agent had entered with third persons who were ignorant of his death. Those who deal with an agent are held to assume the risk that his authority may be terminated by death without notice to them. This rule was established in England (Leake on Con. 487), although now modified by statute, and is generally applied in this country. Story on Agency, § 488; Pars. on Con. 71; 2 Kent's Com. 645, 646.

In some states alterations have been made by statute; and,

following the civil law, it was held in Pennsylvania (Cassidy v. M'Kenzie, 4 Watts & Serg. 282, 39 Am. Dec. 76) that the act of an attorney, done after the death of his principal, of which he was ignorant, are binding upon the parties. This was, however, in opposition to the current of authority. 1 Pars. on Con. 71; 2 Kent's Com. 646.

But even that case does not aid the defendant, for here the agent knew of the death of his principal. Moreover, the defendant might have known it had he taken the precaution to inquire. He had never before dealt with the agent. The power of attorney was not of recent date, and the defendant should be held to have assumed the burden of showing that Hartwig was, at the moment of the transaction, a person authorized to act so as to bind the real owner of the bond and mortgage, whoever that person might prove to be. There is no equity in his favor, for the loss, if any, is from his own negligence.

It is claimed, however, by the learned counsel for the respondents, that the rule has application only where the act of the agent is required to be done in the name of the principal, and his contention is, as we understand it, that, inasmuch as Hartwig had possession of the bond and mortgage, the defendant from that fact had a right to infer an agency to collect, and so the payment was valid. However that might be under other circumstances, the contention has no force in this instance. The power of Hartwig was not left to inference. Whatever it was it came before the defendant in writing. The power of attorney was in his hands. It authorized such acts only as could be performed in the name of the principal, and so the defendant understood it. He caused the power to be recorded, took a discharge of the mortgage under it executed by Hartwig as agent for Weber, and gave the check payable to the order of Hartwig in that character. Except for the power of attorney and its recital, and the acts of Hartwig under it, the defendant would not have even the shadow of a defense. In his own name Hartwig could do nothing, and of this the defendant had full notice. The power of attorney which accompanied possession of the securities defined the actual authority, and the defendant had notice of its contents at the same moment that he saw the bond and mortgage in the hands of the attorney. The authority which might be gathered from their mere possession is, under these circumstances, of no force.

The giving of an authority in writing imports that the extent of the authority is to be looked for in its terms, and not elsewhere.

But a more difficult question remains, one on which the courts below differed, and in consequence of which difference we have jurisdiction to pass upon it. Code, §§ 1337, 1338. It is a question of fact whether, with knowledge of the circumstances, the plaintiff ratified the payment. * * * (The omitted portion of the opinion discusses the evidence as to knowledge and ratification of payment by plaintiff; the court coming to the conclusion that it failed to show such knowledge or ratification.)

It is true that between the time of payment and the beginning of this suit, many years elapsed, but the fact of payment was unknown to plaintiff. It is also true that she failed, before this action and during all these years, to demand either principal or interest from the defendant, but she was altogether ignorant that the security existed, by means of which either had become due. To show the contrary was the duty of the defendant, if the truth enabled him to do so. The trial judge found that he had failed in this respect, and we have no hesitation in saying that a different finding would not have been justified by the testimony. The conclusion actually reached was the only one permitted by the evidence. The appeal necessarily succeeds. Sherwood v. Hauser, 94 N. Y. 626; Baird v. Mayor, etc., 96 Id. 567; Crane v. Baudouine, 55 Id. 256; Westerlo v. DeWitt, 96 Id. 340.

The order of the general term should, therefore, be reversed, and the judgment of the special term affirmed, with costs.

CHAPTER IV.

THE AUTHORITY CONFERRED, ITS NATURE AND EFFECT.

The Nature and Extent of the Agent's Authority—How Determined.

BUTLER v. MAPLES.

9 Wall. 766 (U. S.). 1869.

Butler and others, during the late rebellion, were copartners doing business under the firm name of Bridge & Co., at Memphis, Tenn. One Shepherd professed to act as their agent. He had been authorized, by written agreement in 1863, to purchase cotton for them in Desha county, Arkansas, and its vicinity. He was to buy on the best possible terms, paying not more than 30 cents per pound on the average, and it was agreed that he should pay as little as possible on the cotton until it should be delivered on a boat or within the protection of a gunboat. There was also the testimony of one Martin that he had been sent to Arkansas by defendants, Bridge & Co., with money and instructions for Shepherd, the instructions being that he should purchase cotton for the firm, but was not to pay more than from 30 to 35 cents per pound. He might make small advances, but was instructed not to pay the balance of the purchase money, or make it payable, until the firm should be able to send a boat up the Arkansas river for the cotton, and until it was in their possession, weighed and placed on the boat. He was directed to take no risk for the firm of the destruction of the cotton except to the extent of the money advanced.

While so professing to act as the agent of Bridge & Co., Shepherd purchased 144 bales of cotton from Maples, buying it as it lay, and agreeing to pay 40 cents a pound for it as soon as weighed. Having been weighed, he removed 54 bales of it, but 90 bales were burned before they could be placed on a boat to be carried up the river. The 54 bales went through to Memphis,

and Maples went there to see Bridge & Co. He saw one of the firm, who wholly denied Shepherd's authority, refused to pay anything for the cotton lost, but agreed to pay 50 cents a pound for the 54 bales. Maples took this, believing what was told him as to Shepherd's authority. Having learned more regarding this matter, he sued Bridge & Co. for the price of the cotton burned. Verdict for the plaintiff, and defendants removed the case to the Supreme Court.

STRONG, J. At the trial, it was, of course, incumbent upon the plaintiff to prove not only the contract of sale, but also that Shepherd, with whom the contract had been made, had authority to act for and bind the defendants. Accordingly, evidence was submitted to show that the cotton was purchased by Shepherd when professing to act as an agent for the defendants. There was hardly any controversy about this fact, and no questions are now raised respecting the competency, or sufficiency of the proof, or the manner in which it was submitted to the jury. But the authority of Shepherd to make the contract for the defendants, and bind them to its performance was stoutly denied, and it is now strenuously insisted that the court erred in the instructions given to the jury respecting the evidence of his agency. The defendants insist the court erred in charging that the written agreement between him and Bridge & Co. constituted him their general agent. We do not find that the court did thus instruct the jury, though it must be admitted the charge may have been thus understood. The jury was instructed that if Shepherd held himself out as the general agent of Bridge & Co., the defendants were bound by the contract he made with the plaintiff for the cotton, though in making the contract he transgressed the instructions he had received, and secret limitations of his authority, which instructions and limitations were not revealed to the plaintiff. It is true, as has been noticed, there was other evidence of a general agency beyond that which the agreement furnished, but as it was parol evidence, its force and effect were for the jury, and hence the court could not rightly have charged that the defendants were bound by the contract unless the agreement did itself constitute Shepherd a general agent.

But did it not? The distinction between a general and a special agency, is in most cases a plain one. The purpose of the

latter is a single transaction or a transaction with designated persons. It does not leave to the agent any discretion as to the persons with whom he may contract for the principal, if he be empowered to make more than one contract. Authority to buy for a principal a single article of merchandise by one contract, or to buy several articles from a person named, is a special agency, but authority to make purchases from any persons with whom the agent may choose to deal, or to make an indefinite number of purchases, is a general agency. And it is not the less a general agency because it does not extend over the whole business of the principal. A man may have many general agents —one to buy cotton, another to buy wheat, and another to buy horses. So he may have a general agent to buy cotton in one neighborhood, and another general agent to buy cotton in another neighborhood. The distinction between the two kinds of agencies is that the one is created by power given to do acts of a class, and the other by power given to do individual acts only. Whether, therefore, an agency is general or special is wholly independent of the question whether the power to act within the scope of the authority given is unrestricted, or whether it is restrained by instructions or conditions imposed by the principal relative to the mode of its exercise.

Looking to the agreement between Bridge & Co. and Shepherd, it cannot be doubted that it created a general agency. It was a delegation of authority, to buy cotton in Desha county and its vicinity, to buy, generally, from whomsoever the agent, not his principals, might determine. It had in view not merely a single transaction, or a number of specified transactions, which were in the minds of the principals when the agent was appointed, but a class of purchases, a department of business. It is true that it contained guards and restrictions which were intended as regulations between the parties, but they were secret instructions rather than limitations. They were not intended to be communicated to the parties with whom the agent should deal, and they never were communicated. It was, therefore, not error to instruct the jury as the court did, that the agency was a general one, and that the defendants were bound by the contract, if Shepherd held himself out as authorized to buy cotton, and if the plaintiff had no knowledge of the instructions respecting the mode in which the agent was required to act.

It may be remarked here, that the reasons urged by the plaintiffs in error, in support of their denial of liability for the engagements made by Shepherd, are, that he agreed to pay forty cents per pound for the plaintiff's cotton, that he bought the cotton where it lay instead of requiring delivery on board a steamboat, or within the protection of a gunboat; and that he did not obtain a permit from the government to make the purchase.

The argument is that in the first two particulars he transcended his powers, and that his authority to buy at all was conditioned upon his obtaining a permit from the government. All this, however, is immaterial, if it was within the scope of his authority that he acted. The mode of buying, the price agreed to be paid, and the antecedent qualifications required of him, were matters between him and his principals. They are not matters in regard to which one dealing with him was bound to inquire. But even as between Bridge & Co. and Shepherd a purchase at forty cents per pound was not beyond his authority. He was authorized to buy "on the best possible terms, not paying an average of more than thirty cents per pound." This contemplated his agreeing to pay in some cases above thirty cents. The average was regulated, but no maximum was fixed. Nor is there anything in the agreement that forbade his purchasing cotton deliverable at once where it lay, though not on a boat or in the protection of a gunboat. He was authorized to purchase deliverable at such times and places of shipment as might be agreed upon; that is, deliverable when and where it might be stipulated between him and the seller. True, he was to pay as little as possible until the cotton was delivered on a boat, or within the protection of gunboat; and when thus delivered, the property in the goods was to vest in the principals, excepting his share of the profits, but he was not prohibited from paying the whole price, or agreeing to pay the whole price, if insisted on by the vendor. The stipulation respecting the vesting of ownership was nothing more than a definition of right between him and his principals, as is manifested by the exception. Nor was Shepherd bound to procure a permit in his own name. He might have been, had it been necessary, but if under the permit granted by Bridge & Co. he could purchase as their agent, it was all the agreement required.

It is further objected to the charge given to the jury respect-

ing general and special agency, that it was not applicable to the proof in the case, and was therefore irrelevant and calculated to mislead the jury, and, because, as stating abstract questions of law, the instruction was erroneous. If, in truth, it was irrelevant, it was not on that account necessarily erroneous and calculated to mislead the jury. We are not shown, nor do we perceive, how the jury could have been misled by it. They were instructed that, in cases of special agency, one who deals with the agent must inquire into the extent of his authority, but that a principal is bound by all that his general agent has done within the scope of the business in which he was employed, and this, though the agent may have violated special or secret instructions given him, but not disclosed to the party with whom the agent deals. Surely this was correct, and it was applicable to the evidence in the case. It has been intimated during the argument that the court should have added that no such liability can exist to one dealing with an agent with notice that the particular act of the agent was without authority from the principal. To this several answers may be made. The exception to the general rule, which it is said the court below should have recognized, is implied in what the court did say. Again, there was no request for any such instruction, and still again, the evidence in the case did not demand it.

There was no pretense that the plaintiff had any notice of secret instructions given to Shepherd, or of any limitations upon his authority. Nor was there anything that imposed upon him the duty of making inquiry for secret instructions or for restrictions. There were no circumstances that should have awakened suspicion. The plaintiff was not apprised that the authority was in writing. The argument is very far-fetched that infers a duty to inquire whether the agent had private instruction from the fact that the contract was made in a region that had been in a state of insurrection. * * * Judgment affirmed.

MULLEN v. QUINLAN & CO.

195 N. Y. 109. 1909.

GRAY, J. The principal question for our consideration, upon this appeal, is whether the evidence adduced by the plaintiff made out a case against the defendant and justified the direction

of the verdict for the plaintiff. It is contended, on behalf of the defendant, that the evidence was insufficient to prove that Smith was the defendant's agent in the transaction of the brokerage business conducted at the Glens Falls office. Upon the conclusion of the plaintiff's case, the defendant's counsel moved for a nonsuit upon this and other grounds. The motion was denied and exception was taken. The defendant then rested; offering no evidence. Whereupon, the plaintiff moved for the direction of a verdict in its favor; the trial court granted the motion and the defendant excepted. As neither party had asked to go to the jury upon any question of fact, the court was authorized to determine the case, as one of law, upon the facts in evidence, and if there was any evidence to sustain the determination made, it is conclusive upon the parties. The defendant, in effect, by requesting the court to determine the case upon his motion for a nonsuit, treated the questions as purely legal and acquiesced in their disposal by the court. The exception to the direction of a verdict for the plaintiff avails, only, to bring up the question of the sufficiency of the evidence. (Barnes v. Perine, 12 N. Y. 18; Dillon v. Cockroft, 90 ib. 649.) The appellant does not appear to question this rule and relies upon the absence of "legal proof * * * showing that Smith was authorized to act as agent of the defendant" and upon the inadmissibility of his declarations to show authority.

The difficulty confronting the plaintiff, in making out a case, was not inconsiderable. The defendant was a foreign corporation, having its principal office in Boston. While admitting in its answer that its office was connected with Glens Falls through the lease of a private telegraph wire, all other allegations as to its connection with, or responsibility for, Smith's acts were denied. The plaintiff, however, succeeded in showing that the office in Glens Falls had been in existence for some time and had several signs about it, upon which, in large letters, appeared the name of the defendant; that the Western Union Telegraph Company had leased to the defendant a private wire running into the office; that the defendant kept a deposit with a bank in Glens Falls; that in the course of the bank's dealings with the defendant, it had furnished to Smith, at least once a week and sometimes oftener, drafts to the order of the defendant and had received and cashed drafts sent by the defendant to him and

that these transactions ceased on May 5th, 1906, the date when the office was closed. The writings, or contracts, which evidenced the transactions of purchase by the plaintiff, or by his assignors, bore upon each the name of Smith "correspondent J. J. Quinlan & Co., Boston, Mass." It was shown that, at the time of the transactions in question, two customers of the office, who had received from Smith similar contracts, evidencing purchases of stocks for their accounts, had sent an attorney to Boston and that, within a few days after the closing of the office, they had been settled with by the defendant and had received their certificates through the bank in Glens Falls; upon their paying to the defendant the balances due upon the purchases. This evidence sufficiently justified the inference that Smith was representing the defendant. The circumstances, which were disclosed by the evidence, taken together, imported an agency in Smith and that he was conducting a branch office of the defendant's business. Assuming that the evidence may be regarded as slight, it was sufficient, under the circumstances, to cast the burden upon the defendant of rebutting the inferences, if untrue, by other evidence showing the truth. It was, presumably, within the power of the defendant to disclose the truth as to its relations with Smith and, if depending upon an inability on the part of the plaintiff to prove its case and refusing to give evidence in explanation of circumstances tending to connect it with the ownership of the business of the branch office, it subjected itself, and justly so, to all fair inferences, which those circumstances warranted. Its refusal to give any evidence was a circumstance, which might be taken into consideration, and that presumptions, unfavorable to it, might be indulged in upon the evidence, was a consequence to be expected. The plaintiff was only required to make out a prima facie case and, having done so, it behooved the defendant, if not liable, to repel the presumptions of liability.

So, when testimony by the plaintiff as to conversations with Smith, concerning the defendant, its business, his agency, and the closing of the office by its orders, was admitted over the defendant's objection, if nothing more had been shown than the plaintiff's transactions with Smith, the admission would have presented a material error. The mere declarations of Smith to the plaintiff would have been incompetent to establish his agency

for the defendant. An agent cannot create an authority in himself to bind another by asserting his authority to do the particular act. When, however, the evidence of the conversations with Smith was admitted, a prima facie case had been made to the effect that there was some connection between the defendant and Smith, and that responsibility for some of the brokerage transactions had been recognized. To admit the declarations of Smith, therefore, was not error. It was proper as supplementing the previous evidence.

Party Dealing with an Agent Is Bound to Ascertain His Authority.

LOUDON SAVINGS FUND SOCIETY v. HAGERSTOWN SAVINGS BANK.

36 Pa. St. 498, 78 Am. Dec. 390. 1860.

This was an action of assumpsit brought by the bank against forty-three persons doing business in the name of the Loudon Savings Fund Society, to recover on a certificate of deposit signed by one Easton, the treasurer of the society. The defendants denied his authority to make or issue the certificate. The court below directed a verdict for the plaintiff.

WOODWARD, J. (After stating the facts.) It is apparent that the great question raised upon the record had reference to the character and extent of Easton's authority as the agent of the defendants. The party who avails himself of the act of an agent must, in order to charge the principal, prove the authority under which the act is done. If the authority be created by power of attorney or other writing, the instrument itself must in general be produced; and since the construction of writings belongs to the court, and not to the jury, the fact and scope of the agency are, in such cases, questions of law, and are properly decided by the judge. But the authority may be by parol, or it may be implied from the conduct of the employer in sanctioning the credit given to a person acting in his name, and in many cases the acts of an agent, though not in conformity to his authority, may yet be binding upon his employer, who is left in such cases to seek his remedy against his agent. Whether an

employer be or be not bound by such acts as are not conformable to the commission given by him, depends principally upon the authority being general or special.

By a general agent is understood not merely a person substituted in the place of another, for transacting all manner of business, but a person whom a man puts in his place to transact all his business of a particular kind, as to buy and sell certain kinds of wares, to negotiate certain contracts, and the like. An authority of this kind empowers the agent to bind his employer by all acts within the scope of his employment, and that power cannot be limited by any private order or restriction, not known to the party dealing with the agent. A special agent is one who is employed about one specific act or certain specific acts only, and he does not bind his employer unless his authority be strictly pursued. Paley on Agency, 199 et seq. "A general authority," said Lord Ellenborough, in Whitehead v. Tuckett, 15 East 408, "does not import an unqualified one, but that which is derived from a multitude of instances; whereas a particular authority is confined to an individual instance." And in all instances where the authority, whether general or special, is to be implied from the conduct of the principal or where the medium of proof of agency is per testes, the jury are to judge of the credibility of witnesses and of the implications to be made from their testimony.

As the plaintiff here did not produce any written evidence of Easton's agency, it was the duty of the court to inform the jury what constitutes agency, express or implied, special or general, and to refer to them the questions: 1. Whether the evidence satisfied them that Easton was either the general or special agent of the defendants; and 2. Whether the issuing of the certificate in suit was within the scope of his authority. Peries v. Aycinena, 3 Watts & S. 79; Jordan v. Stewart, 23 Pa. St. 247; Seiple v. Irwin, 30 Id. 513; Williams v. Getty, 31 Id. 461, 72 Am. Dec. 757.

Or, if it was not a case of strict agency, if Easton acted without an authority in issuing the certificate, or transcended such as had been delegated to him, the question of ratification by the defendants was also a mixed question of law and fact. What would in law amount to a ratification was for the court; whether such proofs were found in the case, was for the jury. Such

adoptive authority relates back to the time of the original transaction, and is deemed, in law, the same to all purposes as if it had been given before. Lawrence v. Taylor, 5 Hill (N. Y.) 107-113; and see 1 Livermore on Principal Agent, 44-50; Philadelphia W. & B. Railroad Company v. Cowell, 28 Pa. St. 337, 70 Am. Dec. 128. * * * Reversed.

Construction of Authority of Agent Authorized to Sell Personal Property.

McKINDLY v. DUNHAM.

55 Wisconsin 515, 42 Am. Rep. 740. 1882.

Action for price of goods. The opinion states the facts. The defendant had judgment below.

ORTON, J. A short time before August 11, 1879, one W. L. Kilbourn called upon the defendants at Berlin, Wisconsin, exhibited the cards of the plaintiff's house in Chicago, and solicited and obtained from the defendant an order for 1,000 cigars of a certain brand upon, and sent the same to, the plaintiffs, and the plaintiffs on that day shipped the cigars and sent the bill thereof ($30 at sixty days) to, and they were duly received by, the defendant. About thirty days thereafter the said Kilbourn called upon the said defendant and asked him "if he would just as soon pay him for those cigars as not," and the defendant replied "that he would as soon pay it then as any other time," and paid the same, and said Kilbourn receipted the original bill produced by the defendant in the firm name of the plaintiffs by himself. Kilbourn's real authority as agent of the plaintiffs was to solicit from country merchants orders on them for goods, and if such orders were accepted and filled, Kilbourn was entitled to a small commission thereon. We have no evidence of what the terms of this order were, and are left to presume that it was a mere order or request by the defendant to the plaintiffs for 1,000 cigars, and perhaps at a certain price. The main question in the case is the authority of Kilbourn to receive payment of this bill.

There is no proof of numerous or indeed of any other acts done by this agent of this character, with the express or tacit

consent of the plaintiffs, or of any general habit of dealing, or of any other transaction between these parties of any kind, or that the real scope of his authority beyond what appeared was disclosed at this time. There is nothing besides this one transaction from which his authority and the full scope of his authority can be implied or inferred. It is his apparent or ostensible authority in this one act to do another act of the same kind, and nothing more.

The only question here is, what was his apparent or ostensible authority in this one act. "His implied agency cannot be construed to extend beyond the obvious purposes for which it was apparently created." "The intention of the parties, deduced from the nature and circumstances of this particular case, constitutes the true ground of exposition of the extent of his authority." Story on Agency, § 87; Wright v. Hood, 49 Wis. 235. A principal is responsible for any act of his agent which justifies a party dealing with him in believing that he has given the agent his authority to do such act (1 Pars. on Con. 44; Kasson v. Noltner, 43 Wis. 637); or as Pothier says, "if the agent does not exceed the power with which he was ostensibly invested." This agent did not appear or pretend to have any other authority from the plaintiffs than to solicit orders for goods, and send them to the plaintiffs. This is all he did in this case, and all he pretended he had authority to do. In this case he could not possibly do his principal any harm.

To this extent they authorized him and trusted him; but they might not have been willing to trust him further with the large and dangerous power of receiving payments, and they did not, so far as is possible to infer from this transaction.

But it is said by the learned counsel of the respondent the agent Kilbourn sold the goods to the defendant, and in this power to sell is implied the further power to receive the consideration or payment therefor, and the learned judge of the circuit court in effect so charged the jury, as follows: "Presumptively, Mr. Dunham had the right to pay this bill to the person from whom he purchased the goods" (meaning Kilbourn the agent); and again: "The plaintiffs sending the goods to Dunham upon that sale or order, presumptively Kilbourn had the right to collect that debt."

If what Kilbourn did could properly be called a sale of the

goods, even then this instruction is questionable as an abstract statement of the law; for it does not always, as a general rule, follow that the power to collect the moneys upon them is included in the power of an agent to make contracts for his principal. Story on Ag. § 98; Higgins v. Moore, 34 N. Y. 417; Mynn v. Joliffe, 1 Moody & R. 326.

But the agent did not sell the goods or even contract to sell them. When the defendant had completed his transaction with Kilbourn, there had been no binding contract made, or any sale, absolute or conditional. The defendant could have countermanded his order at any time before the goods were shipped, and the plaintiffs could have refused to accept the order. Neither party had become bound by anything then done.

The order of the defendant was a mere proposal, to be accepted or not, as the plaintiffs might see fit, and he could have withdrawn it before its acceptance. The minds of the parties had not met, and there had been no mutual assent or *aggregatio mentium*. Benj. on Sales, §§ 40, 70; Johnson v. Filkington, 39 Wis. 62. Even as a broker (and he was less rather than more in the authority he exercised in this instance), he need not even see to the delivery of the goods (Story on Sales, § 85); and if his negotiation had been broken off, and the contract not finally completed, he would not be entitled to his commissions. Story on Sales, § 86. As is said in Higgins v. Moore, *supra*, "The duty of a broker, in general, is ended when he has found a purchaser, and has brought the parties together. He is a mere negotiator or middleman between the seller and purchaser." It is only in cases where the broker has possession of the goods that he can sell, and in that case, even, if he parts with the securities he receives on the sale to his principal, his implied authority to receive payment, if he had any, ceases with their possession. Strachan v. Muxlow, 24 Wis. 1. Aside from the clear and obvious reason from the general principles of bargain and sale, and principal and agent, why Kilbourn was not authorized to receive payment as the agent of the plaintiffs in this case, the four following cases, all of them closely analogous, and two of them precisely parallel, are abundant authority: Baring v. Corrie, 2 B. & Ald. 137; Higgins v. Moore, *supra;* Kornemann v. Monaghan, 24 Mich. 36; Clark v. Smith, 88 Ill. 298.

It follows, therefore, that so far the circuit court committed

two flagrant errors: First, in ruling and instructing the jury that Kilbourn, as agent of the plaintiffs, made a sale of the goods to the defendant, and was authorized so to do; and, secondly, that if he did sell the goods, he had therefore authority to receive payment therefor. We omit to consider, whether admitting both these propositions, he could have received payment before it was due according to the terms of the assumed sale, or whether the fact of his proposing payment so long before due did not cast suspicion upon his act, especially as he had not been intrusted with the bill of the goods even, and did not pretend that he had authority to receive payment; leaving to the defendant the mere voluntary act of payment, in answer to the request, "If he would just as soon pay him for those cigars as not."

We have so far treated the case as if nothing else appeared on the face of the bill of goods or figured in the transaction, for this is the most favorable treatment of the case for the defendant. We might omit entirely this other element in the case, if it were not passing over evidence of authority in the agent to receive payment in this particular case, by construction or presumption, and silently sanctioning a judicial practice which we cannot approve. On the face of the bill sent to the defendant, and directly under his address, there appears in large, legible print, in red ink, as if stamped upon it, the words, "Agents not authorized to collect." Through these words, lengthwise, appears drawn a pen line in dark ink as an erasure. The positive testimony of the defendant and in his behalf was only that it was not there when the bill was sent to the defendant. The testimony of the defendant and in his behalf was only that it was there when the bill was paid, and that neither the words nor the erasure were observed when it was received.

It might well be said that there was no contradiction of the testimony of the plaintiffs that the erasure was not made before the bill was sent to the defendant, and that such fact was at least prima facie established. Even on that hypothesis, the Circuit Court refused to instruct the jury, as requested by the counsel of the appellant, that these words were notice to the defendant whether he saw them or not. We think this was clearly erroneous. If these words, so legible and prominent on the face of the bill, would not be notice, it would seem to be impossible

to give a purchaser such a notice. By all authorities he must be presumed to have observed these words, and to have had such notice, when they were so prominent on the face of a bill of goods in his possession, and in which he alone was interested as purchaser. It might as well be said that the contents of any written or printed notice of any kind, or for any purpose, were not presumed to have been brought home to and to be known by a party on his receipt of the notice. It is the law, and ought to have been given as asked, and not left to the problematical finding of the jury. Mamlock v. Fairbanks, 46 Wis. 415. (Omitting a minor point.)

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial. Judgment reversed.

How the Agent's Authority Is to Be Executed—In the Case of Sealed Instruments.

BRIGGS v. PARTRIDGE.

64 New York 357, 21 Am. Rep. 617. 1876.

Appeal by plaintiff from judgment of the General Term affirming a judgment below for defendant. The action was brought to recover money claimed to be due upon a contract for the purchase of lands. According to the complaint and the evidence offered, it appeared that defendant had by parol, constituted one Hurlburd his agent, for the purpose of purchasing the lands in question belonging to the plaintiff; that thereupon Hurlburd, without disclosing the agency, entered into a contract under seal with plaintiff, whereby he agreed to purchase such lands at a specified price; the contract was executed by Hurlburd in his own name, and the plaintiff did not at the time know that the defendant was the real principal in the matter; a small part only of the purchase money was paid. Plaintiff in his complaint avowed himself ready to execute a good and sufficient deed. Such other facts as are material appear in the opinion.

ANDREWS, J. The defendant was not a party to the agreement for the sale and purchase of the land. He did not sign it himself, nor did it purport to have been executed for him by Hurlburd. His name does not appear in it, and there is nothing

upon the face of the agreement to indicate that he was in any way connected with or interested in the purchase. The covenants in the agreement are solely between the plaintiff and Hurlburd. The former covenants to sell and convey the lands to Hurlburd, and Hurlburd covenants to purchase and pay the purchase money as stipulated. The defendant took no part in the negotiation of the agreement, and the plaintiff, when he made and executed it, had no knowledge that Hurlburd was acting as the agent of the defendant. The agreement was under seal, each party affixing his own seal to the instrument. Hurlburd, the apparent purchaser, was in fact acting in the transaction as the agent of the defendant, his undisclosed principal, under an oral authority to enter into the contract in his behalf; and the defendant furnished the money to make the down payment to the broker who negotiated the sale.

This action is brought by plaintiff upon the agreement to recover the unpaid purchase money, and it is sought to enforce it against the defendant as the real purchaser and party, upon the ground that Hurlburd, the nominal purchaser, was acting for him and by his authority in the transaction. The real question is, can the vendor, in a sealed executory agreement, *inter partes,* for the sale of land, enforce it as the simple contract of a person not mentioned in or a party to the instrument, on proof that the vendee named therein, and who signed and sealed it as his contract, had oral authority for such third person to enter into the contract of purchase, and acted as his agent in the transaction, and can the vendor on his proof, there having been no default on his part, and he being ready and willing to convey, recover of such third person the unpaid purchase-money? This question here arises in a case where the vendor, so far as it appears, has remained in possession of the land, and where no act of ratification of the contract by the undisclosed principal has been shown.

It is not disputed, and indeed it cannot be, that Hurlburd is bound to the plaintiff as covenanter, upon the covenants in the agreement. He covenants for himself and not for another, to pay the purchase money, and by his own seal fixes the character of the obligation as a specialty. He is liable to perform the contract irrespective of the fact whether it can be enforced against his nominal principal. On the other hand, it is equally clear

that Hurlburd's covenant cannot be treated as or made the covenant of the defendant. Those persons only can be sued on an indenture who are named as parties to it, and an action will not lie against one person on a covenant which purports to have been made by another. Beckham v. Drake, 9 M. & W. 79; Spencer v. Field, 10 Wend. (N. Y.) 88; Townsend v. Hubbard, 4 Hill (N. Y.) 351.

In the case last cited, it was held that where an agent duly authorized to enter into a sealed contract for the sale of land of his principal, had entered into a contract under his own name and seal, intending to execute the authority conferred upon him, the principals could not treat the covenants made by the agents as theirs, although it clearly appeared in the body of the contract that the stipulations were intended to be between the principals and the purchasers, and not between the vendees and the agent. The plaintiffs in that case were the owners of the land embraced in the contract, and brought their action in covenant to enforce the covenant of the vendees to pay the purchase-money, and the court decided that there was no reciprocal covenant on the part of the vendors to sell, and that for want of mutuality in the agreement the action could not be maintained.

It is clear, that unless the plaintiff can pass by the persons with whom he contracted, and treat the contract as the simple contract of the defendant, for whom it now appears that Hurlburd was acting, this action must fail. The plaintiff invokes in his behalf the doctrine that must now be deemed to be the settled law of this court, and which is supported by high authority elsewhere, that a principal may be charged upon a written parol executory contract entered into by an agent in his own name, within his authority, although the name of the principal does not appear in the instrument, and was not disclosed, and the party dealing with the agent supposed that he was acting for himself, and this doctrine obtains as well in respect to contracts which are required to be in writing, as to those where a writing is not essential to their validity. Higgins v. Senior, 8 M. & W. 834; Truman v. Loder, 11 Ad. & El. 594; Dykers v. Townsend, 24 N. Y. 61; Coleman v. Bank, 53 N. Y. 393; Ford v. Williams, 21 How. (U. S.) 289; Huntington v. Knox, 7 Cush. (Mass.) 371; The Eastern R. R. Co. v. Benedict, 5 Gray (Mass.) 566, 66 Am. Dec. 384; Hubbert v. Borden, 6 Whart. (Pa.) 91;

Browning v. Insurance Co., L. R. 5 P. C. 263; Calder v. Dobell, L. R. 6 C. P. 486. Story on Agency, 148, 160.

It is, doubtless, somewhat difficult to reconcile the doctrine here stated with the rule that parol evidence is inadmissible to change, enlarge or vary a written contract, and the argument upon which it is supported savors of subtlety and refinement. In some of the earlier cases the doctrine that a written contract of the agent could be enforced against the principal was stated, with the qualification that it applied when it could be collected from the whole instrument, that the intention was to bind the principal. But it will appear, from an examination of the cases cited that this qualification is no longer regarded as an essential part of the doctrine. Whatever ground there may have been originally to question the legal soundness of the doctrine referred to, it is now too firmly established to be overthrown, and I am of the opinion that the practical effect of the rule as now declared is to promote justice and fair dealing.

There is a well recognized exception to the rule in the case of notes and bills of exchange, resting upon the law merchant. Persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them; and a person not a party cannot be charged upon proof that the ostensible party signed or endorsed as his agent. Barker v. Mechanics' Ins. Co., 3 Wend. (N. Y.) 94, 20 Am. Dec. 664; Pentz v. Stanton, 10 Id. 271, 35 Am. Dec. 558; DeWitt v. Walton, 9 N. Y. 570; Stackpole v. Arnold, 11 Mass. 27, 6 Am. Dec. 150; Eastern R. R. v. Benedict, supra; Beckham v. Drake, 9 M. & W. 70. That Hurlburd had oral authority from the defendant to enter into a contract for the purchase of the land, and that he was acting for the defendant in making it is admitted; and if the contract had been a simple contract and not a specialty the defendant would, I think, have been bound by it within the authorities cited.

No question would arise under the statute of frauds, for the statute prescribing what shall be necessary to make a valid contract for the sale of land requires only that the contract, or some note or memorandum thereof expressing the consideration should be in writing and subscribed by the party to whom the sale is to be made, or his agent lawfully authorized. 2 R. S. 135, §§ 8, 9. In this case the contract was signed by the vendors;

and even if it had been executed on their part by an agent pursuant to an oral authority, it would have been a valid execution within the statute. Lawrence v. Taylor, 5 Hill (N. Y.) 113; Worrall v. Munn, 5 N. Y. 229, 55 Am. Dec. 330. But the vendee's contract need not be in writing. McCrea v. Purmort, 16 Wend. (N. Y.) 469, 30 Am. Dec. 103.

We return then to the question originally stated. Can a contract under seal, made by an agent in his own name for the purchase of the land, be enforced as the simple contract of the real principal when he shall be discovered. No authority for this broad proposition has been cited. There are cases which hold that when a sealed contract has been executed in such form, that it is in law, the contract of the agent and not of the principal, but the principal's interest in the contract appears upon its face and he has received the benefit of performance by the other party and has ratified and confirmed it by acts in *pais*, and the contract is one which would have been valid without a seal, the principal may be made liable in assumpsit upon the promise contained in the instrument, which may be resorted to to ascertain the terms of the agreement. Randall v. Van Vechten, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193; DuBois v. Canal Co., 4 Wend. 285; Lawrence v. Taylor, supra. See also Evans v. Wells, 22 Wend. 324; Worrall v. Munn, supra; Story on Agency, § 277; 1 Am. Lead. Cas. 735, note.

The plaintiff's agreement in this case was with Hurlburd and not with the defendant. The plaintiff has recourse against Hurlburd on his covenant, which was the only remedy which he contemplated when the agreement was made. No ratification of the contract by the defendant is shown. To change it from a specialty to a simple contract, in order to charge the defendant is to make a different contract from the one the parties intended. A seal has lost most of its former significance, but the distinction between specialties and simple contracts is not obliterated. A seal is still evidence, though not conclusive, of a consideration. The rule of limitation in respect to the two classes of obligations is not the same. We find no authority for the proposition that a contract under seal may be turned into a simple contract of a person not in any way appearing on its face to be a party to or interested in it on proof *dehors* the instrument that the nominal party was acting as the agent of another, and especially in the

absence of any proof that the alleged principal has received any benefit from it, or has in any way ratified it, and we do not feel at liberty to extend the doctrine applied to simple contracts executed by an agent for an unnamed principal so as to embrace this case. The general rule, is declared by Shaw, C. J., in Huntington v. Knox, 7 Cush. (Mass.) 374: "Where a contract is made by deed, under seal, on technical grounds, no one but a party to the deed is liable to be sued upon it, and therefore, if made by an attorney or agent, it must be made in the name of the principal in order that he may be a party, because otherwise he is not bound by it."

The judgment of the general term should be affirmed.

All concur. Judgment affirmed.

CHAPTER V.

LEGAL EFFECT OF THE RELATION AS BETWEEN PRINCIPAL AND AGENT.

Duties and Liabilities of the Principal to the Agent.

SUSSDORFF v. SCHMIDT.

55 N. Y. 319. 1873.

CHURCH, C. J. This action is for brokerage upon the sale of valuable real estate situated on Long Island.

The plaintiff claimed $50,000 as agreed compensation, and the principal points litigated were whether such agreement had been made or whether the plaintiff was in fact the efficient cause of the sale. The jury found against the special agreement, but found for the plaintiff a verdict which allowed him a commission, probably of two and a half per cent. upon the amount of the sale. Upon the close of the plaintiff's evidence, the defendants moved for a non-suit upon the ground that the plaintiff had not shown himself to be the efficient cause of the sale, which was denied, and this is now claimed to have been erroneous.

A person claiming a commission upon a sale of real estate must show an employment, and that the sale was made by means of his efforts or agency. An owner may employ several brokers for the sale of the same property, and is of course only liable for commissions to the one who effects the sale. And although he employs one or more brokers he may negotiate and sell the property himself without liability to any one for commissions: 49 N. Y. 563. The undertaking of the broker is to make efforts to procure a purchaser, but if he fails he is entitled to no pay unless there is a special contract. But if the purchaser is found by his efforts and through his instrumentality, he is entitled to compensation, although the owner negotiates the sale himself: 51 N. Y. 124. Nor is it indispensable that the purchaser should be introduced to the owner by the broker

nor that the broker should be personally acquainted with the purchaser; but in such case it must affirmatively appear that the purchaser was induced to apply to the owner through the means employed by the broker.

The evidence on the part of the plaintiff tended to prove that the plaintiff acted as a broker for the seller of the property to the defendants, and from motives of personal friendship to them was anxious that they should purchase, as he believed it was a good speculation; that he claimed from them a part of the commission upon that sale, which they declined to pay, but told him to go get what he could from the seller and he should have a part of the profits when they sold; that he also suggested to the defendants the mode of disposing of the property to realize the most money; that he procured some maps from the seller which he put up in different places, and also procured signs to be painted and put up near the premises, and inserted an advertisement of the property in the *Long Island Star,* which referred to the plaintiff as a broker, and which was recognized and paid for by the defendants; that sometime afterward a sale of the property was negotiated by the defendants with one Marwig, acting in behalf of an association of bricklayers, at $420,000. Marwig was introduced to the defendants by one Eckersdoff, a real estate broker, and the evidence of the plaintiff tended to show that both he and Marwig were attracted to this property by the maps and signs and advertisements which the plaintiff put up and caused to be made. It is shown that they frequently spent their evenings in a saloon where the plaintiff had put up a map, and talked about the property; that Marwig and another person went to look at the property, and was told by a hotel keeper where he called, and at whose house a map had also been put up by the plaintiff, where to find the property and where to inquire for the plaintiff. The plaintiff had no personal communication with Marwig or Eckersdoff before the negotiation for the purchase of the property; but during the negotiation he inserted an advertisement in the *Staats Zeitung,* when the defendants sent for him and told him not to advertise the property any more or make any further efforts to effect a sale, as they were in negotiation with other parties and that he should have his commission if the sale was effected. From

this evidence the jury might fairly infer that the purchaser was secured by the efforts of the plaintiff, and that the claim of the plaintiff to brokerage was recognized by the defendants by their promise to pay it. It did not appear that the defendants knew that Eckersdoff and Marwig came to purchase in consequence of information obtained through the plaintiff, and it may be that this fact, if it existed, was designedly withheld from them so as to secure commissions for Eckersdoff. However that may be, it is not conclusive against the plaintiff. If he was the producing cause of this sale, his right to compensation would not be affected by the circumstance that the defendants were ignorant of it at the time, nor should he be prejudiced by the acts of others. It was not error to refuse the non-suit and submit the facts to the jury. Some of those facts were controverted by the defendants, and considerable evidence was produced to prove that the plaintiff had no agency in procuring the purchaser, and that the sale was effected entirely independent of him. It is not our province to pass upon the facts. The Court fairly submitted the question, whether the plaintiff was the procuring cause of the sale, to the jury, and their decision is conclusive upon us.

The point is made, that there was no evidence of the rate of commissions nor of the value of the plaintiff's services. The plaintiff claimed a specific sum agreed upon, and the evidence was mainly directed to the question whether such sum had been fixed by the parties, but there was some evidence which might legitimately guide the jury upon that question. The plaintiff testified, upon cross-examination, that he received one per cent., which was $700, from the seller upon the sale to the defendants, and that his whole commission would have been $1,750, which would be two and a half per cent., and that when the defendants requested him not to make any further efforts to sell the property for them, one of them said, "you shall have your commission or your pay anyhow." From these facts, if true, it might be inferred that the usual rate was two and a half per cent., and that defendants referred to that rate in their promise. It is true that the plaintiff stated that he received from the first sellers one-half of the brokerage, and that was one per cent., or $700, but when asked the distinct question how much his whole commission would

be, he answered $1,750, which was two and a half per cent. It is unnecessary to consider whether the evidence given of the alleged sum agreed to be paid would be any criterion for the jury in awarding damages. The other evidence, although rather slight, was sufficient to uphold the verdict.

The learned counsel for the defendants also insists that, inasmuch as the complaint is upon a contract for a specific sum, the plaintiff could not recover as upon a *quantum meruit*. This point is not tenable for several reasons.

1. The complaint contains sufficient averments to enable the plaintiff to recover the value of the services rendered, without reference to the allegation of an agreed compensation. 2. At most it was only a variance between pleading and proof, which might be disregarded unless it misled the defendants, which was not pretended: Code, § 169. 3. This objection was not taken at the trial. The exception to that part of the charge authorizing the jury, if they found that no specific sum was agreed upon, to find the value of the services, was too general to raise this question. The attention of the Court should have been called to the point, as, if valid, it might then have been obviated by an amendment.

The offer to prove what share of the recovery the plaintiff had agreed to give his attorney was properly rejected. It was immaterial; as such arrangements are now lawful, a party is not discredited as a witness by making them. Nor does an agreement to give an attorney a share of a recovery, for his services, give him such an interest in the cause of action as would make his admissions proper or make him liable for costs.

So, whether the defendants had realized profits from the sale was immaterial. When the defendants made the contract of sale the duties of the plaintiff ceased, and his right to compensation was then fixed, whether the defendants ever realized profits or not. The offer only contemplated profits then realized, without taking into account the unpaid purchase-money. Besides, the question of profits could only be material under the special contract, which was not found to exist.

We do not find that any substantial error of law was committed on the trial, and the judgment must be affirmed.

Judgment affirmed.

Duties and Liabilities of the Agent to His Principal—Good Faith—Obedience to Instructions, Notice, Etc.

THE PEOPLE v. TOWNSHIP BOARD.

11 Michigan 222. 1863.

Application for *mandamus* to compel the township to issue bonds to pay for work done under a contract to improve a harbor. Defense that the contract was void because four of the Board who let the contract were among the contractors for doing the work.

MANNING, J. Four of the relators, who took the contract to build the piers, were members of the board of freeholders organized under the act for the purposes therein mentioned, and that let the contract on behalf of the public. So careful is the law in guarding against the abuse of fiduciary relations, that it will not permit an agent to act for himself and his principal in the same transaction, as to buy of himself, as agent, the property of his principal, or the like. All such transactions are void, as it respects his principal, unless ratified by him with a full knowledge of all the circumstances. To repudiate them he need not show himself damnified. Whether he has been or not is immaterial. Actual injury is not the principle the law proceeds on in holding such transactions void. Fidelity in the agent is what is aimed at, and as a means of securing it the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal. Hence, the law will not permit an administrator to purchase at a public sale by himself, property of the estate on which he has administered; or a guardian the property of his ward, when sold by himself.

All public officers are agents, and their official powers are fiduciary. They are trusted with public functions for the good of the public; to protect, advance and promote its interests, and not their own. And a greater necessity exists than in private life for removing from them every inducement to abuse the trust reposed in them, as the temptations to which they are sometimes exposed are stronger, and the risk of detection and exposure is less. A judge cannot hear and decide his own case,

or one in which he is personally interested. He may decide it conscientiously, and in accordance with law, but that is not enough. The law will not permit him to reap a personal advantage from an official act performed in favor of himself. For these reasons we hold the contract we are asked to enforce by *mandamus* void as against public policy. See Clute v. Barron, 2 Mich. 192; Dwight v. Blackmar, 2 Mich. 330, 57 Am. Dec. 130; Ingerson v. Starkweather, Walk. (Mich.) Ch. 346; Beaubien v. Poupard, Har. (Mich.) Ch. 206; Walton v. Torrey, Har. Ch. 259; Perkins v. Thompson, 3 N. H. 144; Obert v. Hammel, 3 Harrison (N. J.) 74; Lazarus v. Bryson, 3 Bin. (Pa.) 54.

We think it no exception to the rule we have stated, that all the contractors were not members of the board of freeholders, or that those who were members were a minority of the board. The rule would not amount to much if it could be evaded in any such way. It might almost as well not exist, as to exist with such an exception. The public would reap little or no benefit from it.

Being against the relators on this part of the case, I think it unnecessary to notice the other points made on the argument.

The *mandamus,* I think, should be denied, with costs.

(CHRISTIANCY, J., delivered a concurring opinion.)

CHAPTER VI.

LEGAL EFFECT OF THE RELATION AS BETWEEN PRINCIPAL AND THIRD PARTY.

Disclosed Principal.

BYINGTON v. SIMPSON.

134 Massachusetts 169, 45 Am. Rep. 314. 1883.

Suit on contract. The opinion states the case. The plaintiffs had judgment below.

HOLMES, J. This is a suit to recover a balance due under a building contract. The contract was in writing and purported on its face to be made by the plaintiffs with J. B. Simpson. It provided that the work should be done under the direction of J. B. Simpson, agent, and was signed "J. B. Simpson, agent." J. B. Simpson was in fact contracting as agent for the defendant, his wife, and this was known to the plaintiffs at the time the contract was made.

The defendant contends that she was not bound by this contract under the foregoing circumstances. The fact that the contract purports to be under seal, although not sealed, has not been relied on as affecting the case, which especially in view of the inartificial nature of the instrument, it ought not to do; but the argument is that inasmuch as the plaintiffs knew of the existence of a principal before the contract was made, and then were contented to accept a written agreement which on its face bound the agent, they must be taken to have dealt with, and to have given credit to, the agent alone; just as upon a subsequent discovery of the undisclosed principal, they might have determined their right to charge him by a sufficient election to rely upon the credit of the agent.

We are of opinion that plaintiff's knowledge does not make their case any weaker than it would have been without it. Whatever the original merits of the rule that a party not

mentioned in a simple contract in writing may be charged as a principal upon oral evidence, even where the writing gives no indication of an intent to bind any other person than the signor, we cannot reopen it, for it is as well settled as any part of the law of agency. Huntington v. Knox, 7 Cush. (Mass.) 371, 374; Eastern Railroad v. Benedict, 5 Gray (Mass.) 561, 66 Am. Dec. 384; Lerned v. Johns, 9 Allen, 419; Hunter v. Giddings, 97 Mass. 41; Exchange Bank v. Rice, 107 Id. 37, 41, 9 Am. Rep. 1; National Ins. Co. v. Allen, 116 Mass. 398; Higgins v. Senior, 8 M. & W. 834. And it is evident that words which are sufficient on their face, by established law, to bind a principal, if one exists, cannot be deprived of their force by the circumstance that the other party relied upon their sufficiency for that purpose. Yet that is what the defendant's argument comes to. For the same parol evidence that shows the plaintiffs' knowledge of the agency may warrant the inference that the plaintiffs meant to have the benefit of it and to bind the principal.

The only reasons which have been offered for the admissibility of oral evidence to charge the alleged principal confirm this conclusion. That suggested in Higgins v. Senior, ubi supra, is the same which is usually given for the liability of a master for his servant's torts, that the act of the agent is the act of the principal (see 1 Bl. Com. 432; Laugher v. Pointer, 5 B. & C. 547, 553; Williams v. Jones, 3 H. & C. 602, 609); the meaning of which, in its later application at least, is, as was stated long ago, that master and servant are "feigned to be all one person." West's Symboleography, part I, § 3, "Of the Fact of Man." The most plausible explanation which has been attempted pursues the same thought more clearly. It is said that the principal is liable "because he is taken to have adopted the name of the (agent) as his own for the purpose of (the) contract." 2 Smith Lead. Cas. 8th ed. 408, note to Thompson v. Davenport; Trueman v. Loder, 11 Ad. & El. 589, 595; s. c. 3 P. & Dav. 267, 271. If this is to be accepted, there is obviously the strongest ground for saying that the principal has adopted the agent's name for the purpose of a given contract when it is shown that both parties have acted on that footing.

The most that could fairly be argued in any case would be, that under some circumstances, proof that the other party knew of the agency, and yet accepted a writing which did not refer

to it, and which in its natural sense bound the agent alone, might tend to show that the contract was not made with any one but the party whose name was signed; that the agent did not sign as agent, and was not understood to do so, but was himself the principal. But these are questions of fact, and as a matter of fact it is obvious, and it is found, that the defendant was the principal, and that the contract was made with her.

The objection that two persons cannot be bound by the same signature to a contract, if sound, would be equally fatal when the principal was not known. There is a double obligation, although there can be but one satisfaction.

Our decision is in accordance with a thoroughly discussed English case which went to the exchequer chamber, and with the statement of the law by Mr. Justice Story there cited. Calder v. Dobell, L. R. 6 C. P. 486. Story, Agency, § 160a.

Judgment for plaintiffs affirmed.

Undisclosed Principal.

KAYTON v. BARNETT.

116 New York 625. 1889.

Plaintiffs sold goods to one Bishop for $4,500. He paid $3,000 on delivery and gave three notes for the balance. He died insolvent not having paid any of the notes. Afterward, plaintiffs tendered these notes to defendants and sued them to recover the $1,500 on the ground that Bishop was really acting as agent for defendants in making the promise. Defendants denied the agency. Judgment for defendants below.

FOLLET, C. J. When goods are sold on credit to a person whom the vendor believes to be the purchaser, and he afterwards discovers that the person credited bought as agent for another, the vendor has a cause of action against the principal for the purchase price. The defendants concede the existence of this general rule, but assert that it is not applicable to this case, because, while Bishop and the plaintiffs were negotiating, they stated they would not sell the property to the defendants, and Bishop assured them that he was buying for himself and not for them.

It appears by evidence, which is wholly uncontradicted, that the defendants directed every step taken by Bishop in his negotiations with the plaintiffs; that the property was purchased for and delivered to the defendants, who have ever since retained it; that they paid the $3,000 towards the purchase price, and agreed with Bishop, after the notes had been delivered, to hold him harmless from them. Notwithstanding the assertion of the plaintiffs that they would not sell to the defendants, they, through the circumvention of Bishop and the defendants, did sell the property to the defendants, who have had the benefit of it, and have never paid the remainder of the purchase price pursuant to their agreement. Bishop was the defendant's agent. Bishop's mind was, in this transaction, the defendant's mind, and so the minds of the parties met, and the defendants having, through their own and their agent's deception, acquired the plaintiff's property by purchase, cannot successfully assert that they are not liable for the remainder of the purchase price because they, through their agent, succeeded in inducing the defendants to do that which they did not intend to do, and, perhaps, would not have done had the defendants not dealt disingenuously.

The judgment should be reversed and a new trial ordered.

Judgment reversed.

Duties and Liabilities of Third Persons to the Principal.

HUNTINGTON v. KNOX.

7 Cush. 371 (Mass.). 1851.

SHAW, C. J. This action is brought to recover the value of a quantity of hemlock bark, alleged to have been sold by the plaintiff to the defendant, at certain prices charged. The declaration was for goods sold and delivered, with the usual money counts. The case was submitted to a referee by a common rule of Court, who made an award in favor of the plaintiff, subject to the opinion of the Court on questions reserved, stating the facts in his report, on which the decision of those questions depends.

The facts tended to show that the bark was the property of

the plaintiff; that the contract for the sale of it was made by her agent, George H. Huntington, by her authority; that it was made in writing by the agent, in his own name, not stating his agency, or naming or referring to the plaintiff, or otherwise intimating, in the written contract, that any other person than the agent was interested in the bark.

Objection was made, before the referee to the admission of parol evidence and to the right of the plaintiff to maintain the action in her own name. The referee decided both points in favor of the plaintiff holding that the action could be maintained by the principal and owner of the property, subject to any set-off, or other equitable defense which the buyer might have if the action were brought by the agent.

The Court are of opinion, that this decision was correct upon both points. Indeed they resolve themselves substantially into one; for prima facie, and looking only at the paper itself, the property is sold by the agent, on credit; and in the absence of all other proof, a promise of payment to the seller would be implied by law; and if that presumption of fact can be controverted, so as to raise a promise to the principal by implication, it must be by evidence aliunde, proving the agency and property in the principal.

It is now well settled by authorities, that when the property of one is sold by another, as agent, if the principal give notice to the purchaser, before payment, to pay to himself, and not to the agent, the purchaser is bound to pay the principal, subject to any equities of the purchaser against the agent.

When a contract is made by deed under seal, on technical grounds, no one but a party to the deed is liable to be sued upon it; and therefore, if made by an agent or attorney, it must be made in the name of the principal, in order that he may be a party, because otherwise he is not bound by it.

But a different rule, and a far more liberal doctrine, prevails in regard to a written contract not under seal. In the case of Higgins v. Senior, 8 Mees. & Welsb. 834, it is laid down as a general proposition, that it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract of sale, so as to give the benefit of the contract, on the one hand to, and charge with liability on the other, the unnamed principals; and this

whether the agreement be or be not required to be in writing, by the statute of frauds. But the Court mark the distinction broadly between such a case and a case where an agent, who has contracted in his own name, for the benefit, and by the authority of a principal, seeks to discharge himself from liability, on the ground that he contracted in the capacity of an agent. The doctrine proceeds on the ground that the principal and agent may each be bound; the agent, because by his contract and promise he has expressly bound himself; and the principal, because it was a contract made by his authority for his account; Paterson v. Gandasequi, 15 East 62; Magee v. Atkinson, 2 Mees. & Welsb. 440; Trueman v. Loder, 11 Ad. & El. 589; Taintor v. Prendergast, 3 Hill 72; Edwards v. Golding, 20 Verm. 30. It is analogous to the ordinary case of a dormant partner. He is not named or alluded to in the contract; yet as the contract is shown in fact to be made for his benefit, and by his authority, he is liable.

So, on the other hand, where the contract is made for the benefit of one not named, though in writing, the latter may sue on the contract, jointly with others, or alone, according to the interest: Garrett v. Handley, 4 B. & C. 664; Sadler v. Leigh, 4 Camph. 195; Coppin v. Walker, 7 Taunt. 237; Story on Agency, § 410. The rights and liabilities of a principal, upon a written instrument executed by his agent, do not depend upon the fact of the agency appearing on the instrument itself, but upon the facts; 1, that the act is done in the exercise, and 2, within the limits, of the powers delegated; and these are necessarily inquirable into by evidence: Mechanics' Bank v. Bank of Columbia, 5 Wheat. 326.

And we think this doctrine is not converted by the authority of any of the cases cited in the defendant's argument. Hastings v. Lovering, 2 Pick. 214, was a case where the suit was brought against an agent, on a contract of warranty upon a sale made in his own name. The case of the United States v. Parmele, Paine, 252, was decided on the ground that, in an action on a written executory promise, none but the promisee can sue. The Court admit that, on a sale of goods made by a factor, the principal may sue.

This action is not brought on any written promise made by the defendant; the receipt is a written acknowledgment, given

by the plaintiff to the defendant, of part payment for the bark, and it expresses the terms upon which the sale had been made. The defendant, by accepting it, admits the sale and its terms; but the law raises the promise of payment. And this is by implication, prima facie, a promise to the agent; yet it is only prima facie, and may be controlled by parol evidence that the contract of sale was for the sale of property belonging to the plaintiff, and sold by her authority to the defendant, by the agency of the person with whom the defendant contracted.

We are all of opinion that the provisions of Rev. Sts., chap. 28, § 201, do not apply to the sale of bark, as made in this case.

Judgment on the award for the plaintiff.

CHAPTER VII.

LEGAL EFFECT OF THE RELATION AS BETWEEN AGENT AND THIRD PARTY.

Duties and Liabilities of Agent to Third Persons—In Contract.

KROEGER v. PITCAIRN.

101 Pa. St. 311, 47 Am. Rep. 718. 1882.

Pitcairn was a fire insurance agent and had written a policy for Kroeger. Kroeger kept petroleum on his premises which was forbidden by the terms of the policy, unless written consent was indorsed thereon. Kroeger called Pitcairn's attention to this clause and was assured by the latter that no written indorsement was required where the amount kept was so small as that which Kroeger carried in stock. Kroeger therefore accepted the policy without the indorsement. A fire destroyed his stock and in an action against the insurance company, Kroeger was defeated because he had kept this petroleum without the written consent. He brought this action against Pitcairn to recover damages for the misrepresentation. Judgment for defendant below.

STERRETT, J. The subject of complaint, in both specifications of error, is the entry of judgment for defendant non obstante veredicto. It is contended that upon the facts established by the verdict, judgment should have been entered thereon in favor of plaintiff. The jury were instructed to return a verdict for the amount claimed by him, if they were satisfied the allegations of fact contained in the point presented by him were true. In view of this, the finding in his favor necessarily implies a verification of the several matters specified in plaintiff's point, and hence it must now be regarded as containing a truthful recital of the circumstances connected with the delivery of the policy and payment of the premium.

The transaction, as therein detailed, clearly amounted to a

mutual understanding or agreement between the parties that the stock of merchandise mentioned in the policy should include one barrel of carbon oil; in other words, that the plaintiff should have the privilege of keeping that quantity of oil in connection with and as a part of the stock insured, without thereby invalidating his policy. It is impossible to regard the transaction in any other light. The jury found that plaintiff "took the policy upon the faith" of the representations made by defendant. These representations were not merely expressions of opinion as to the meaning of the policy. On the contrary, the defendant acting as its agent and assuming authority to speak for the insurance company, asserted without any qualification that when carbon oil was kept as plaintiff was in the habit of keeping it—a single barrel at a time—it was unnecessary to mention the fact in the policy, or otherwise obtain the consent of the company; that no notice is ever taken of it unless "it is kept in large quantity—say several hundred barrels. In that case, when it is wholesale, it should be mentioned; but as long as it is kept, not more than a barrel in the store at a time, it is considered as general merchandise and is not taken notice of in any other way." Such was the language employed by defendant, evidently for the purpose of dispelling any doubt that existed in the mind of the plaintiff and inducing him to accept the policy and pay the premium; and to that end at least it was successful. What was said and done by defendant, in the course of a transaction, amounted to more than a positive assurance that the accepted meaning of the policy was as represented by him. In effect, if not in substance, his declarations were tantamount to a proposition, on behalf of the company he assumed to represent, that if the insurance was effected it should be with the understanding that a barrel of carbon oil was included in and formed part of the insured stock of merchandise, without being specially mentioned in the policy.

The plaintiff doubtless so regarded his declarations, and relying thereon, as the jury has found, accepted the policy on the terms proposed, and thus concluded, as he believed, a valid contract of insurance, authorizing him to keep in stock, as he had theretofore done, a small quantity of carbon oil. It was not until after the property was destroyed that he was undeceived. He then discovered, that in consequence of defendant having

exceeded his authority, he was without remedy against the company. Has he any remedy against the defendant, by whose unauthorized act he was placed in this false position? We think he has. If the president or any one duly authorized to represent the company had acted as defendant did, there could be no doubt as to its liability. Why should not the defendant be personally responsible, in like manner, for the consequences, if he, assuming to act for the company, overstepped the boundary of his authority and thereby misled the plaintiff to his injury, whether intentionally or not.

The only difference is that in the latter the authority is self-assumed, while in the former it is actual, but that cannot be urged as a sufficient reason why plaintiff, who is blameless in both cases, should bear the loss in one and not in the other. As a general rule, "whenever a party undertakes to do any act as the agent of another, if he does not possess any authority from the principal therefor, or if he exceeds the authority delegated to him, he will be personally liable to the person with whom he is dealing for, or on account of his principal." Story on Agency, 264. The same principle is recognized in Evans on Agency, 301; Whart. on Agency, 524; 2 Smith's Lead. Cases, 380, note; 1 Pars. Cont. 67, and in numerous adjudicated cases, among which are Hampton v. Speckenagel, 9 S. & R. 212, 222, 11 Am. Dec. 704; Layng v. Stewart, 1 W. & S. 222, 226; McConn v. Lady, 100 W. N. C. 493; Jefts v. York, 10 Cuch. 392; Baltzen v. Nicolay, 53 N. Y. 467.

In the latter case, it is said, the reason why an agent is liable in damages to the person with whom he contracts when he exceeds his authority, is that the party dealing with him is deprived of any remedy upon the contract against the principal. The contract, though in form that of the principal, is not his in fact, and it is but just that the loss occasioned by there being no valid contract with him should be borne by the agent who contracted for him without authority. In Layng v. Stewart, supra, Mr. Justice Huston says: "It is not worth while to be learned on very plain matters. The cases cited show that if an agent goes beyond his authority and employs a person, his principal is not bound, and in such case the agent is bound."

The plaintiff in error, in McConn v. Lady, supra, made a contract, believing he had authority to do so, and not intending to

bind himself personally. The jury found he had no authority to make the contract as agent, and this court, in affirming the judgment, said: "It was a question of fact submitted to the jury whether the plaintiff in error had authority from the school board to make the contract as their agent. They found he had not. He was personally liable whether he made the contract in his own name or in the name of his alleged principal. It is a mistake to suppose that the only remedy was an action against him for the wrong. The party can elect to treat the agent as a principal in the contract."

The cases in which agents have been adjudged liable personally have sometimes been classified as follows, viz.: 1. Where the agent makes a false representation of his authority with intent to deceive. 2. Where, with the knowledge of his want of authority, but without intending any fraud, he assumes to act as though he were fully authorized; and 3. Where he undertakes to act bona fide, believing he has authority, but in fact has none, as in the case of an agent acting under a forged power of attorney. As to cases fairly brought within either of the first two classes there cannot be any doubt as to the personal liability of the self-constituted agent, and his liability may be enforced either by an action on the case for deceit, or by electing to treat him as principal. While the liability of agents, in cases belonging to the third class, has sometimes been doubted, the weight of authority appears to be that they are also liable.

In Story on Agency, the learned author, recognizing the undoubted liability of those belonging to the first two classes, says: "Another case may be put which may seem to admit of some doubt, and that is where the party undertakes to act as an agent for the principal, bona fide, believing he has due authority, and therefore acts under an innocent mistake. In this last case, however, the agent is held by law to be equally as responsible, as he is in the two former cases, although he is guilty of no intentional fraud or moral turpitude. This whole doctrine proceeds upon a plain principle of justice, for every person so acting for another, by a natural if not a necessary implication, holds himself out as having competent authority to do the act, and he thereby draws the other party into a reciprocal engagement. If he has no such authority and acts bona fide, still he does a wrong to the other party; and if that wrong produces injury

to the latter, owing to his confidence in the truth of an express or implied assertion of authority by the agent, it is perfectly just that he who makes such assertion should be personally responsible for the consequences, rather than that the injury should be borne by the other party who has been misled by it." Story on Agency, 264. This principle is sustained by the authorities there cited, among which is Smout v. Ilbery, 10 Mees. & Wels. 1, 9.

Without pursuing the subject further, we are of the opinion that upon the facts established by the verdict, judgment should have been entered for the plaintiff, on the question of law.

Judgment reversed, and judgment is now entered in favor of the plaintiff for $3,027.20, the amount found by the jury, with interest from January 20, 1882, the date of the verdict.

Judgment reversed.

MEYER v. REDMOND.

141 App. Div. 123 (N. Y.). 1910.

THOMAS, J. The defendants, doing business under the name of Adrian H. Muller & Son, sold at auction stock which was purchased by plaintiff, who sues for failure to deliver. The stock was advertised for sale at public auction, "for account of whom it may concern," and was knocked down at public bidding to plaintiff. The terms of sale were "10 per cent today, and the balance before one o'clock tomorrow, payable to the auctioneers at their office, No. 55 William St.," and the advertisement thereof is signed "Adrian H. Muller & Son, Auctioneers." After the due payment of the ten per cent the defendants delivered to the plaintiff a slip signed by them stating in effect a sale of the stock from the defendants to the plaintiff. The following day plaintiff tendered the balance, but defendants failed to deliver the stock. The defendants offered evidence, which was rejected, of the entry of the sale in the auction book, showing the real name of the seller, the refusal of such seller to deliver the stock, and that the seller's name was disclosed to plaintiff on the day of sale, when he tendered the ten per cent.

It must then be assumed, for the purposes of this discussion, that the defendants, as auctioneers, advertised and offered the

stock for sale, knocked it down to the plaintiff, and stated to the purchaser the name of the seller before the memorandum was given. The entry of the sales in the auctioneer's book was properly rejected, as the rights of the parties had been fixed by earlier acts, and the evidence of oral notice of the real seller was inadmissable, as the legal obligations and the identity of the contracting parties was determined by the knocking down of the stock to the plaintiff, confirmed, although that was unnecessary, by the delivery, subsequent to the rejected notice of the real seller, or the defendants' individual memorandum of sale. The auctioneer, pursuant to the advertisement, offered the stock without disclosing the principal; the plaintiff bid, that is, offered to give a sum for the property, the auctioneer accepted it, and sold the property by striking off the property to him. (Bowman v. McClenahan, 20 App. Div. 346, 348.) Now, what was the legal effect of this, irrespective of the Statute of Frauds, which is not here involved? The defendants assert that the passing of title was conditioned upon the payment of the sum bid. It is immaterial whether the title passed at the time the goods were knocked down, with right of possession in the seller to protect his lien for the purchase money, as decided in Haggerty v. Palmer, 6 Johns. Ch. 437; Lucas v. Wallace, 42 Ill. App. 172; Jenness v. Wendell, 51 N. H. 63; Clark v. Greely, 62 id. 394, or whether its vesting in the plaintiff was conditioned upon payment of the price. In this connection it may be stated briefly that the condition, in the absence of agreement, had not in cases of goods sold at auction been held to relate to the payment of money, but to something to be done to the property for the purpose of delivery, or to be done in respect to the ascertainment of the price (Jenness v. Wendell, supra; Clark v. Greely, supra), or to the furnishing of the security for the purchase price when the goods are sold on credit (Matthews v. McElroy, 79 Mo. 202; Williams v. Connoway, 3 Houst. [Del.] 63; Mazoue v. Caze, 18 La. Ann. 31; Morgan v. East, 126 Ind. 42), where a note without security was to be given. While such discussion is unimportant for this decision, it may be doubted whether there is sufficient reason for departing in auction sales from the usual rule, that when personal property is by agreement deliverable upon payment of the price, the title does not pass until payment made. (Empire State Type Founding Co. v. Grant, 114 N. Y.

40; Schryer v. Fenton, 15 App. Div. 158; Hammett v. Lenneman, 48 N. Y. 399.) If there is express stipulation as to concurrent delivery and payment, the intention is to be found from the acts and circumstances. (Empire State Type Founding Co. v. Grant, supra.) In the case at bar the very terms of sale and all the surrounding circumstances show that the sale was practically for cash, and that delivery and final payment were to be concurrent. However this may be, when the stock was knocked down, a contract was made in which the defendants were the sellers and the plaintiff the buyer. If a person, in fact an agent, undertakes to contract as principal, he becomes such, notwithstanding the other party may suspect that he is an agent, and has means of ascertaining the name of the principal. The knowledge of the agency must exist, and that the party contracts as such. (De Remer v. Brown, 165 N. Y. 410.) There is no evidence that the defendants as agents offered the stock for sale and knocked it down to the plaintiff, or that plaintiff had notice and knowledge of such agency. Their occupation and its immediate exercise at the time did not give the plaintiff such knowledge. (Mills v. Hunt, 20 Wend. 431.) In that case it was decided that an auctioneer in fact acting as agent is bound as principal, unless at the time of the sale he disclose the name of his principal; that his general employment is not per se notice that he acts as agent, nor is it material that he is known to the other party to be an auctioneer, or broker, who is usually employed in selling property as the agent of others, and that even if he discloses the name of his principal, if he signs a written contract in his own name merely, which does not upon its face show that he was acting as the agent of another, or in an official capacity in behalf of the government, he will be personally bound thereby. But in De Remer v. Brown, supra, the court indicates that knowledge by a party that the other party is acting as agent will exonerate him as principal, and cites Holt v. Ross, 54 N. Y. 472, 475; Cobb v. Knapp, 71 id. 348, 352. But the vocation does not furnish the knowledge. In Holt v. Ross, supra, an express company was regarded as a principal in presenting for payment a draft with the payee's name forged thereon, although its general business was to act for others; and in the dissenting opinion Mills v. Hunt is cited with approval, and the language of Nelson, Ch. J., in the same case in the Supreme Court (17 Wend. 335)

is quoted: "The defendants are to be regarded as the owners of all the goods sold to the plaintiff, for the purpose of deciding the question stated. They so held themselves out by the catalogues, and nothing transpired at the sale varying the legal effect of such conduct. Honest dealing requires the auctioneer to disclose in his catalogue, or otherwise, the names of his principals, if he does not intend to take their places in respect to the purchasers; otherwise, he would be enabled to speculate upon them, by thrusting between him and them an irresponsible owner in every case of an unprofitable sale. This, however, is a point not to be discussed; the principle has been so long settled, and is so frequently applied in the dealings of mankind, as to be familiar to every lawyer." The defendants as agents did not offer the stock. They advertised an auction sale at the "Exchange Sales Room," and signed the advertisement as auctioneers, and made the purchase price payable to the "Auctioneers at their office," and they sold accordingly. In other words, they, auctioneers, sold as such. This general fact the plaintiff knew, but as said in Baltzeh v. Nicolay, 53 N. Y. 470: "Nor does the fact that the agent is an auctioneer, and that the contract arises upon a sale by him as such, withdraw it from the operation of the rule" that the "agent who makes a contract for an undisclosed principal is personally bound by it." If, then, the defendants in offering the property for sale were acting as to the plaintiff as principals, what was the logical consequence? The offer for sale, the plaintiff's bid, the acceptance thereof by the defendants by declaring the property sold to them, that is, knocking the property down to them, constituted a contract and gave the plaintiff a vested right that no subsequent acts of the defendants could without the assent of the plaintiff undo. It is immaterial whether title passed absolutely or conditionally. The parties were bound, the one to deliver and the other to pay. The Statute of Frauds might, if invoked, prevent enforcement of rights, but the parties to the contract had become fixed. But at this period the defendants claim later to have advised the plaintiff that some third person was the real vendor. The rejection of such evidence was not error. Such advice could not release the already obligated defendants and substitute for them another person as seller. The defendants cannot escape a fixed liability by disclaiming it and pointing to another as obligated to discharge it. (Burnham

v. Eyre, 123 App. Div. 777; De Remer v. Brown, 165 N. Y. 410. 417.) In Cobb v. Knapp, 71 N. Y. 353, it is said: "The subsequent disclosure of the principals by the agent, and the commencement of an action against them is not conclusive of an election to hold them responsible only. (Raymond v. Crown, 2 Metc. 319; Curtis v. Williamson, 10 Queen's Bench [L. R.] 57.) In the recent case of Beymer v. Bonsall, 79 Penn. R. 298, it was held that neither the agent nor principal in such a case would be discharged short of satisfaction." But the defendants, the seller by the oral contract, later embodied their contract in writing. They accepted the partial payment of ten per cent and thereupon gave him a memorandum:

"Sold at auction this day, to Chas. G. Meyer, 40 shares,
The Lake Charles Rice Milling Co. of Louisiana at 40..$1,600
"Received 10 per cent on account..... 160

"Balance $1,440
"Payable before one o'clock tomorrow, Thursday.
"Adrian H. Muller & Son,
"Per R."

This is a bill of sale showing that the defendants personally had sold the stock (Hargraves Mills v. Gordon, 137 App. Div. 695, 698; Bibb v. Allen, 149 U. S. 481, 498), and accords fully with their previous personal obligations. There is no attempt to stipulate that a third person is the seller, or that the defendants are acting as agents. Assuming that they disclosed the real seller, does this instrument bind them? The rule is stated that: "Even where he (the agent) discloses the name of his principal, if he signs a written contract in his own name merely, which contract does not upon its face show that he was acting as the agent of another * * * he will be personally bound thereby." (Mills v. Hunt, 20 Wend. 434; Bassett v. Perkins, 65 Misc. Rep. 103.) The agent may, as defendants urge, relieve himself from personal liability by disclosing his agency before closing the contract. But even after such disclosure the agent may contract so as to bind himself. But it is not necessary to determine whether this sale note, dissociated from the oral sale, binds the defendants. It is sufficient that the written instrument accords with the oral contract in presenting the defendants as sellers,

and shows that whatever was said as to the real sellers, the parties did not modify the defendants' existing obligations. The case is unfortunate for the defendants. But the law that binds them has long existed, and they disregarded it at their peril. The damages were justified by the evidence.

Duties and Liabilities of the Agent to Third Persons—In Tort.

DELANEY v. ROCHEREAU & CO.

34 La. Ann. 1123, 44 Am. Rep. 456. 1882.

Action of damages, for negligence producing death. The death was caused by the falling of a gallery upon a building belonging to a foreign owner, and in charge of the defendants as his agents. The defendants had judgment below.

BERMUDEZ, C. J. This is an action to hold agents liable to third parties for injury sustained in consequence of an alleged dereliction of duty, or non-feasance on their part. * * * .

The contention is, that as the injuries received caused intense suffering, and as they were occasioned by the falling of the gallery, which was in very bad condition, to the knowledge of the defendants, who, as the agents of the owner, were bound to keep it in good order, and who without justification neglected to do so, their firm and each member thereof are responsible in solido for the damages claimed.

The theory on which the suit rests is, that agents are liable to third parties injured, for their non-feasance.

In support of that doctrine, both the common and the civil law are invoked.

At common law an agent is personally responsible to third parties for doing something which he ought not to have done, but not for not doing something which he ought to have done, the agent in the latter case, being liable to his principal only. For non-feasance or mere neglect in the performance of a duty, the responsibility therefor must arise from some express or implied obligation between particular parties standing in privity of law or contract with each other. No man is bound to answer for such violation of duty or obligation except to those to whom he had become directly bound or amenable for his conduct.

Everyone, whether he is principal or agent, is responsible directly to persons injured by his own negligence, in fulfilling obligations resting upon him in his individual character and which the law imposes upon him, independent of contract.

No man increases or diminishes his obligations to strangers by becoming an agent. If in the course of his agency, he comes in contact with the person or property of a stranger, he is liable for any injury he may do to either by his negligence, in respect to duties imposed by law upon him in common with all other men.

An agent is not responsible to third persons for any negligence in the performance of duties devolving upon him purely from his agency, since he cannot, as agent, be subject to any obligations toward third persons other than those of his principal. Those duties are not imposed upon him by law. He has agreed with no one except his principal to perform them. In failing to do so, he wrongs no one but his principal, who alone can hold him responsible.

The whole doctrine on that subject culminates in the proposition that wherever the agent's negligence, consisting in his own wrong doing, therefore in an act, directly injures a stranger, then such stranger can recover from the agent damages for the injury. Story Agency, 308, 309; Story Bailm. 165; Shearm. & Redf. Neg. 111, 112, ed. 1874; Evans' Agency, notes by Ewell, 437, 438; Whart. Neg. 535, 78, 83, 780.

It is an error to suppose that the principle of the civil law, on the liability of agents to third persons, is different from those of the common law. It is certainly not broader.

While treating of "negligence in discharge of duties not based on contract," which had not previously been considered, Wharton, beginning the third book of his remarkable work on Negligence, says:

"The Roman law in this respect rests on the principle that the necessity of society requires that all citizens should be educated to exercise care and consideration in dealing with the persons and property of others. Whoever directly injures another's person or property by the neglect of such care, is in culpa and is bound to make good the injury caused by his neglect. The general responsibility is recognized by the Aquilian law, enacted about three centuries before Christ, which is the basis of Roman

jurisprudence in this relation. Culpa in this class consists mainly in commission, in faciendo. Thus an omission by a stranger to perform an act of charity is not culpa; it is culpa, however, to inadvertently place obstacles on a road over which another falls and is hurt, to kindle a fire by which another's property may be burned, to dig a trench which causes another's wall to fall." He subsequently states that the following are cases in which no responsibility can possibly attach:

"When a man does everything in his power to avoid doing the mischief, or when it is of a character utterly out of the range of expectation, the liability ceases and the event is to be regarded as a casualty.

"If the injury is due to the fault of the party injured, the liability of the party injuring is extinguished.

"Quod quis ez sua culpa damnum sentit, non intelligitur sentire."—Pomponius. Whart. Neg. 780. 300.

The allusion made by certain writers to the Roman law, which gives a remedy in all cases of special damages, must necessarily be understood as referring to instances in which the wrong or damage is done, or inflicted by an actual wrong-doing or commission of the injuring party.

The article of the French Code, 1992, from which article 3003 of our R. C. C. derives, which is to the effect that the agent is responsible not only for unfaithfulness in his management, but also for his fault and mistake, contemplates an accountability to the principal only, and this by reason of the assumption of responsibility by the acceptance of the mandate. How indeed can an agent be responsible to a third person for the management of the affairs of his principal, or for a mistake committed in the administration of his property? The responsibility for fault is likewise in favor of the "mandant" alone.

The Napoleon Code article 1165, contains the formal provision that agreements have effect only on the contracting parties; they do not prejudice third parties, nor can they avail them, except in the case mentioned in article 1121. This last article refers to stipulations in favor of autrui, which becomes obligatory when accepted.

The code of 1808 contained a corresponding article, but that of 1825 did not; neither does the revised code of 1870. It must not be concluded, however, that the omission to incorporate the

provision in the subsequent legislation must be considered as a repudiation of the doctrine.

The distinguished compilers and framers of the code of 1825 account for the omission to reproduce because the provisions were already embodied in other articles, and might be deemed to be exceptions to the undoubted rule that contracts can only avail or prejudice the parties thereto. Projet du Code de 1825, 264.

Quod inter alios actum est, aliis neque nocet, neque prodest. § L. 20, De instit. Act. See, also, Pothier on Oblig. Nos. 85, 87; Domat L. 1, t. 16, § 3, No. 8; L. 2, t. 8; Troplong Mand., No. 510; Duranton 10, No. 541; Toullier 6, 341; Toullier 7, 252, 306; Demolomle 25, No. 38; Laurent 10, No. 377; Larombiere, 1, 640.

That such is the case was formerly recognized by the court of Cassation of France, in the case of Thomassin, decided in July, 1869, and reported in part 1 of Dalloz, J. G., for that year. The syllabus in the case is in the following words: "Le mandataire n'est responsable des fautes qu'il commet dans l' execution du mandat, qu' envers le mandant." See, also, J. G. Vo. Obl. nos. 878 et seq., and Vo. Mandat, No. 213.

The case of Beaugillot v. Callemer, 33 Sirey, 322, far from expounding a doctrine antagonistical to that prevailing, as was seen, at common law, and which we consider as well settled likewise under the civil law, is fully confirmatory of the same. It was the case of an agent condemned to pay damages for obstructing, by means of beams, a water-course partly closed up by masonry, and thus causing an overflow, in consequence of which a hay crop was damaged. The plea of respondent superior did not avail. The court well held that the commission of the act constituted a quasi offense, in justification of which the mandate could not be set up.

This anterior view of the case relieves the court from the necessity of passing upon the other questions presented, relative to fault, trespass, contributory negligence, suffering and damages.

Judgment affirmed with costs.

LEADING ILLUSTRATIVE CASES LAW OF SALES OF PERSONAL PROPERTY

CHAPTER II.

SUBJECT MATTER OF SALES.

Potential Property.

GRANTHAM v. HAWLEY.

Hobart 132 (Eng.). 1616.

Robert Grantham brought an action of debt upon an obligation of £40 against Edward Hawley, the condition whereof was that, if a certain crop of corn growing upon a certain piece of ground, late in the occupation of Richard Sankee, did of right belong to the plaintiff, then the plaintiff should pay for it £20. Now the case upon pleading and demurrer fell out thus. That one Sutton was seized of the land, and 30 Eliz. in April made a lease of it to Richard Sankee for twenty-one years by indenture, and did thereby covenant, grant to and with Sankee, his executors and assigns, that it shall be lawful for him to take, and carry away to his own use, such corn as should be growing upon the ground at the end of the term. Then Sutton conveyed the reversion to the plaintiff, and John Sankee, executor to Richard, having sowed the corn, and that being growing upon the ground at the end of the term, sold it to the defendant.

And it was argued by Hutton for the plaintiff that it was merely contingent whether there should be corn growing upon the ground at the end of the term or not. Also the lessor never had property in the corn, and therefore could not give nor grant it, but it sounded properly in covenant; for the right of the corn standing in the end of the term being certain, accrues

with the land to the lessor, and it was said to be adjudged. And it was agreed by the court that if A seized of land sow it with corn, and then convey it away to B for life, remainder to C for life, and then B die before the corn is reaped, now C shall have it and not the executors of B, though his estate was uncertain. Note, the reason of industry and charge in B fails, yet judgment in this case was given against the plaintiff; that is, that the property and very right of the corn, when it happened, was passed away; for it was both a covenant and a grant, and therefore if it had been of natural fruits, as of grass or hay, which run merely with the land, the like grant would have carried them in property after the term. Now, though corn be fructus industrialis, so that he that sows it may seem to have a kind of property ipso facto in it divided from the land, and therefore the executor shall have it and not the heirs; yet in this case all the color that the plaintiff hath to it is by the land which he claims from the lessor which gave the corn. And though the lessor had it not actually in him, nor certain, yet he had it potentially; for the land is the mother and root of all fruits. Therefore he that hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant, as 21 Hen. VI. A person may grant all the tithe wool that he shall have in such a year, yet perhaps he shall have none; but a man cannot grant all the wool that shall grow upon his sheep that he shall buy hereafter; for there he hath it neither actually nor potentially. And though the words are here not by words of gift of the corn, but that it shall be lawful for him to take it to his own use, it is as good to transfer the property, for the intent and common use of such words, as a lease without impeachment of waste, for the like reason, and not ex vi termini, gives the trees.

What Things May Have Potential Existence.

LOW v. PEW.

108 Massachusetts 347. 1871.

Replevin by the firm of Alfred Low & Company of a lot of flitched halibut from the assignees in bankruptcy of the firm of John Low & Son, all of Gloucester. Writ dated August 24, 1869.

The parties stated the following case for the judgment of the court:

On April 17, 1869, as the schooner "Florence Reed," owned by John Low & Son, was about to sail from Gloucester on a fishing voyage, that firm received $1,500 from the plaintiffs, and signed and gave the plaintiffs the following writing:

"We, John Low & Son, hereby sell, assign, and set over unto Alfred Low & Company all the halibut that may be caught by the master and crew of the schooner "Florence Reed," on the voyage upon which she is about to proceed from the port of Gloucester to the Grand Banks, at the rate of five cents and a quarter per pound for flitched halibut, to be delivered to said Alfred Low & Company as soon as said schooner arrives at said port of Gloucester at their wharf. And we, the said John Low & Son, hereby acknowledge the receipt of $1,500 in part payment for the halibut that may be caught by the master and crew of said schooner on said voyage."

In July, 1869, proceedings in bankruptcy were begun against John Low & Son in the district court of the United States for this district, in which they were adjudged bankrupts on August 6, and on August 20 these defendants were appointed the assignees in bankruptcy, and the deed of assignment was executed to them. On Saturday, August 14, the "Florence Reed" arrived at the port of Gloucester on her home voyage, and was hauled to the plaintiffs' wharf; and on the morning of Monday, August 16, the United States marshal took possession of the vessel and cargo under a warrant issued to him on August 6 in the proceedings in bankruptcy, and transferred his possession to the defendants upon their appointment.

The catch of the schooner consisted of about 40,000 pounds of halibut, and of some codfish. The plaintiffs demanded the halibut of the defendants, and offered at the same time to pay the price of it at the rate of five and a quarter cents per pound, less the $1,500 already paid. The defendants refused the demand; and the plaintiffs then replevied such a quantity of the halibut as represented the amount of $1,500 at that rate per pound, and offered to receive the rest of the halibut and pay for it at the same rate, but the defendants refused to acknowledge any right whatever of the plaintiffs in or to the fish.

If on these facts the plaintiffs were entitled to recover, they

were to have judgment for nominal damages; but if otherwise, the defendants were to have judgment for a return, with damages equal to interest at the annual rate of six per cent on the appraised value of the fish replevied.

MORTON, J. By the decree adjudging John Low & Son bankrupts, all their property, except such as is exempted by the bankrupt law, was brought within the custody of the law, and by the subsequent assignment passed to their assignees. Williams v. Merritt, 103 Mass. 184. The firm could not by a subsequent sale and delivery transfer any of such property to the plaintiffs. The schooner which contained the halibut in suit arrived in Gloucester, August 14, 1869, which was after the decree of bankruptcy. If there had been then a sale and delivery to the plaintiffs of the property replevied, it would have been invalid. The plaintiffs therefore show no title to the halibut replevied, unless the effect of the contract of April 17, 1869, was to vest in them the property in the halibut before the bankruptcy. It seems to us clear, as claimed by both parties, that this was a contract of sale, and not a mere executory agreement to sell at some future day. The plaintiffs cannot maintain their suit upon any other construction, because, if it is an executory agreement to sell, the property in the halibut remained in the bankrupts, and, there being no delivery before the bankruptcy, passed to the assignees. The question in the case therefore is, whether a sale of halibut afterwards to be caught is valid, so as to pass to the purchaser the property in them when caught.

It is an elementary principle of the law of sales that a man cannot grant personal property in which he has no interest or title. To be able to sell property, he must have a vested right in it at the time of the sale. * * *

It is equally well settled that it is sufficient if the seller has a potential interest in the thing sold. But a mere possibility or expectancy of acquiring property, not coupled with any interest, does not constitute a potential interest in it, within the meaning of this rule. The seller must have a present interest in the property, of which the thing sold is the product, growth, or increase. Having such interest, the right to the thing sold, when it shall come into existence, is a present vested right, and the sale of it is valid. Thus a man may sell the wool to grow upon his own

sheep, but not upon the sheep of another; or the crops to grow upon his own land, but not upon land in which he has no interest.

* * * * * * * * * *

In the case at bar, the sellers, at the time of the sale, had no interest in the thing sold. There was a possibility that they might catch halibut; but it was a mere possibility and expectancy, coupled with no interest. We are of opinion that they had no actual or potential possession of, or interest in, the fish; and that the sale to the plaintiffs was void.

The plaintiffs rely upon Gardner v. Hoeg, 18 Pick. 168, and Tripp v. Brownell, 12 Cush. 376. In both of these cases it was held that the lay, or share in the profits, which a seaman in a whaling voyage agreed to receive in lieu of wages, was assignable. The assignment in each case was, not of any part of the oil to be made, but of the debt which under the shipping articles would become due to the seaman from the owners at the end of the voyage. The court treated them as cases of assignments of choses in action. The question upon which the case at bar turns did not arise, and was not considered.

Judgment for the defendants.

CHAPTER III.

IDENTIFICATION OF THE GOODS.

Goods Must Be Specified.

ROBINSON v. STRICKLIN.

73 Neb. 242, 102 N. W. 479. 1905.

[Plaintiff entered into a contract with defendant whereby he agreed to furnish defendant seed corn for the purpose of planting a certain acreage of corn, and defendant agreed to deliver to the plaintiff "the entire merchantable increase" in a "bright, well cured, marketable condition, the seeds to retain their natural color, and the corn to be free from impure, rotten or bad kernels." It was further stated that "all the right, title, and interest in and to said seed and corn crops in all condition is, and shall remain in" the plaintiff.]

LETTON, C. This is an action in replevin brought * * * to recover possession of a quantity of corn grown by the defendant * * * under a contract with the plaintiff. * * *

It will be observed that no specific land upon which the crop was to be grown is mentioned in the contract; that while the defendant was bound by the contract to plant a certain acreage of corn, to cultivate it, and to "deliver the merchantable increase" thereof, the plaintiff was not bound to accept the same, or any part of it, unless it had germinating qualities which should test at least 85 per cent., be delivered in a bright, well-cured, marketable condition, and be free from impure, rotten, or bad kernels. It is clear that the execution of this contract on the part of the defendant required a separation of the corn crop so that that which failed to germinate to the percentage specified, and the impure, rotten, or bad kernels, and those that were not bright and well-cured, should be separated from the remainder of the crop; and that it was only that portion of the crop which came up to the standard established in the contract

which the plaintiff could, by its terms, be compelled to accept. The plaintiff, by this contract, did not agree to purchase or to pay for all of the corn grown by the defendant from the seed furnished under the contract. If the larger portion of the crop had been deficient in the qualifications required, which, under the climatic conditions in this state, might well happen in some years, he would have no interest so far in the crop, and no right to insist upon its delivery to him. The general rule is that, where anything remains to be done by either or both parties to a contract of sale, before delivery, either to determine the identity of the thing sold, the quantity, or the price, the contract, until such things are done, is executory, and the title does not vest in the purchaser. Holmes v. Bailey, 16 Neb. 304, 20 N. W. 304.

It is true that the contract recites and the plaintiff argues that the payment to the defendant is to be made for his labor and service in planting and attending the crops, but since the evidence shows the plaintiff did not furnish the land upon which the crop was to be grown, and that it was the intention of the parties that it was to be grown upon land leased by the defendant, the contract failed to recite the truth. He was to be paid not for labor alone, but for that which embodies both labor and the energy of the soil and elements—a certain portion of the crop itself. Taken as a whole, the contract is a contract of sale of a certain portion of crops yet to be planted, the portion sold to be identified by means of a certain standard set forth therein. In order to identify the portion sold, the measure and standard specified in the contract must be applied, and it would be impossible to determine to what extent the plaintiff would be liable under the contract to take and pay for the crop until this had been done. Manifestly, the contract was executory in its character. It was not the sale of the entire mass of a crop to be grown upon a certain specified tract of land, which has been held by some courts to be an executed contract, and to pass title to the crop, but it was, in effect, a sale of a certain portion of a crop yet to be raised, which was indistinguishable, and not capable of identification, until separated from the mass. See note 5, p. 1042 (2d Ed.) Am. & Eng. Encyc. of Law. Further than this, the contract provides for a sale of property not in esse. The seed was in being at that time, but that was all. It is dif-

ferent from a case wherein a landlord rents certain specific land to a tenant upon which the tenant agrees to raise a crop, and that the title to the crops should remain in the landlord until after division. Such a case was Sandford v. Modine, 51 Neb. 728, 71 N. W. 740, cited by plaintiff, from which this case is easily distinguishable. The contract herein recites that the defendant has borrowed the seed, but that is as far as any potentiality of the crop was in existence. Authorities differ as to how far a sale may be made of an article which is not yet in existence. The general doctrine is that, if the property has a potential existence—such, for example, as the natural increase or product of property which is already in the hands of the seller —it may be sold or mortgaged.

* * * * * * * * *

The contract in the instant case attempted to give the plaintiff title to corn which was not in existence either actually or potentially, and which, after it was grown, required to be separated and distinguished from the entire crop before the vendee could ascertain that portion which he was entitled to receive and pay for. If the plaintiff had refused to accept the corn, and the defendant had brought an action for damages for the breach of the contract, he could not have recovered for the whole of the crop, but, if at all, merely for that portion which possessed the qualifications required, and to ascertain this required a separation and division from the mass. Assuming that the contract is valid as an executory contract of sale of part of the crop—which we do not decide—the plaintiff can only recover by proving title in himself to the specific property replevied. Before his title to any of the crop could be complete, it was necessary that it should be separated, and set apart to him. This not having been done, his title never ripened into a perfect one. We conclude, therefore, that the contract was executory in its nature, and that the title to the property could not pass to the plaintiff until separated and delivered to him by the defendant. This not having been done, the title never passed, and he is not entitled to recover in this action.

* * * * * * * * *

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

Mutual Assent to Passing of Title.

WHEELHOUSE v. PARR.

141 Mass. 593, 6 N. E. 787. 1886.

[The defendant in Lowell, Massachusetts, ordered goods by mail of the plaintiff, in England, with instructions to "ship to care of McIver, shipping merchant, Liverpool, as soon as possible, for his next steamer." McIver was a shipping merchant at Liverpool and part-owner and agent of the Cunard line of steamers. This order was filled by the plaintiff, and the goods were shipped by the Cunard line and duly received by the defendant. Subsequently the defendant wrote to the plaintiff, acknowledging the receipt of these goods, saying: "As regards the shipping of the goods just received, you have done everything satisfactory. Ship this order in like manner." The goods were sent, according to defendant's instructions, to McIver, who, upon receiving them, wrote to the plaintiff as follows: "Are we to keep them for our steamer sailing 14th inst., or ship by the 'Glamorgan' which is a very slow steamer sailing 7th inst., and will not, we think, arrive out before our steamer?" The "Glamorgan" was a steamer belonging to a line for which McIver was not the agent, and of which steamer he was not the owner. The plaintiff replied to McIver's letter as follows: "Send the goods by the steamer which will arrive first." Thereupon, without further instructions of any kind, McIver caused the goods to be shipped by the "Glamorgan," which foundered in mid-ocean and the goods were lost. From a judgment in favor of the plaintiff the defendant appealed.].

DEVENS, J. When goods ordered and contracted for are not directly delivered to the purchaser, but are to be sent to him by the vendor, and the vendor delivers them to the carrier, to be transported in the mode agreed on by the parties, or directed by the purchaser; or when no agreement is made, or direction given, to be transported in the usual mode; or when the purchaser, being informed of the mode of transportation, assents to it; or when there have been previous sales of other goods to the transportation of which, in a similar manner, the purchaser has not objected,—the goods, when delivered to the carrier, are at the

risk of the purchaser, and the property is deemed to be vested in him, subject to the vendor's right of stoppage in transitu. This proposition assumes that proper directions and information are given to the carrier as to forwarding the goods. * * *

The defendant had made a purchase of leather in November, previously to the purchase of that the price of which is in controversy, under a direction to the plaintiff to "ship to care of D. & C. McIver, shipping merchants, Liverpool, as soon as possible, for their next steamer to Boston, direct." This shipment was made as ordered, and on December 16, 1884, the defendant sent a further order saying: "As regards the shipping of the leather just received, you have done everything satisfactory. Ship this order in like manner."

The directions by which the plaintiff was to be controlled must be interpreted as requiring him to forward the goods to D. & C. McIver, to be transported by them by the Cunard line, of which they were managers and agents. The words "their next steamer" could not have meant any steamer which would accept freight from D. & C. McIver. Cases may be readily imagined where these words would be of the highest importance; as if the defendant had an open policy of insurance protecting his goods which might be sent by the Cunard line. It might also be true that the defendant would not deem a policy of insurance necessary when goods were sent by a well-established passenger line, where greater precaution might probably be taken for safety, which he would deem necessary, than when they were sent by a purely freighting steamer. The goods were actually forwarded to D. & C. McIver, with instructions in conformity with the directions of the defendant, and, had the matter ended there, so far as any directions to D. & C. McIver is concerned, the plaintiff would be entitled to treat them as delivered to the defendant, and to require him to pay the purchase money. If, on the other hand, while the goods were yet in the hands of the carrier, and before transportation of them had commenced, the plaintiff changed the directions given to him by the defendant, or authorized the carrier to transport them in a different mode from that directed by the defendant, and loss has thereby occurred, he cannot contend that they were delivered to the defendant by him. By continuing to exercise dominion over them, and by giving a new direction, impliedly withdrawing the directions

previously given, he cannot be allowed to assert that he had made a complete delivery by his original act, if a loss has occurred by reason of that which he has subsequently done or directed. The change in the directions given relates back to and qualifies the original delivery.

The plaintiff, in answer to a letter from D. & C. McIver, after the goods had reached them, inquiring whether they were to keep the goods "for our steamer, 14th inst., or ship by the 'Glamorgan,'" ordered them to be shipped by the steamer arriving out first, presumably the steamer which D. & C. McIver believed would be the first to arrive. The "Glamorgan" was not a steamer of any line of which D. & C. McIver were owners or agents, and in no way answers the description of "their steamer" as applied to D. & C. McIver. By neglecting to limit the authority of D. & C. McIver to send by a steamer which could be thus described, and by directing them to send by the steamer which would first arrive, the plaintiff had failed to comply with the orders of the defendant as to the shipment of goods; and if correct directions had originally been given, had withdrawn them, and substituted others. When, therefore, exercising the authority thus given by the plaintiff, D. & C. McIver send by the "Glamorgan," as being, in their judgment, the steamer likely to arrive first, and a loss occurs, it should not be borne by the defendant, whose directions have not been followed.

Judgment for the defendant.

Sale of Goods to be Separated from a Mass.

COURTRIGHT & CO. v. LEONARD et al.

11 Iowa 32. 1860.

Replevin for 25,000 brick, which plaintiffs claim to have bought of one Moore, and which were levied upon by one of the defendants, as sheriff, under an attachment, at the suit of Leonard, against said Moore. The facts attending the sale by Moore to plaintiffs are as follows: On the 27th of September, 1857, Moore was indebted to plaintiffs near the sum of $150, which he agreed to pay them out of a kiln of brick which he had made. The kiln contained 110,000, each arch containing between 9,000 and 10,000. Plaintiff's agent, at their request, examined

the kiln to ascertain the quality of the brick. This agent "computed 25,000 of the brick, which would by the estimate (of 9,000 or 10,000 to the arch) take two arches and a large fraction of the third." He finding the brick on the west end to be the best, concluded to take 25,000 from that portion of the kiln calculated by arches as aforesaid. He then returned to his employers, and they took from Moore the following instrument:

"W. H. Courtright & Co.

Bought of James C. Moore,

"25 M brick off the west end of my kiln, which kiln is situated about ten rods east of the school house, south of the New School Church in Koosuth Co., @ $6, $150.

September 25th, 1857.

Rec'd payment,

James C. Moore."

Moore was at the same time credited in plaintiff's books for the brick, at $6 per thousand. The agent and Moore then returned to the kiln, and Moore said, "I deliver to you 25,000 off the west end." He also told plaintiffs that they could have until the next spring to take them away. The brick were never counted out nor separated from the balance of the kiln, nor in any manner set apart for plaintiffs, other than as above stated. The entire kiln was levied on, under Leonard's attachment, on the 29th day of October, 1857; and this action commenced in April, afterwards. Under the instructions given, the jury returned a verdict for plaintiffs, from which defendants appeal.

WRIGHT, J. The question presented for our consideration is * * * whether there was such a sale by Moore, to plaintiffs, as passed the title, without any other or further act.

It is claimed the sale was complete, for the reason that the delivery was as perfect as could at the time be made in view of the character of the property sold. Delivery, it is conceded, completes the sale and vests the property in the vendee, but such delivery, in its character, must depend upon that which is the subject of the sale. This rule, however, has more particular application to cases, where there is a sale of the entire thing, as a ship at sea or the like, or to the position or situation of the article sold, as goods in transitu, or where they are inaccessible, as logs in a boom. But in this case there was an attempted sale

of a portion of a bulk, and the question is, whether there was such a designation of that sold as amounted to a delivery, and hence a complete transfer of the title.

As to the general rule upon this subject there is no controversy. In Cook v. Logan, 7 Iowa, 142, it was stated thus: "Where some act remains to be done in relation to the articles which are the subject of the sale, as weighing or measuring; or, as in this case, that of separating and setting them apart from the bulk, so that they may be distinguished and identified, the performance of such act is a "pre-requisite, and until it is performed, the property does not pass to the vendee." Citing Davis v. Hill, 3 N. H. 382; 7 Cow. 85; 3 Greenl. 44; 2 Hill 137; Story on Cont., § 800; 1 Pars. on Cont. 441. The same general rule is stated thus by Chancellor Kent, 2 Com. 496: "When the goods sold are mingled with others, they must be ascertained, designated and separated from the mass, before the property can pass. It is a fundamental principle pervading everywhere the doctrine of sales of chattels, that if goods be sold while mingled with others, by number, weight or measure, the sale is incomplete, and the title continues with the seller, until the bargained property be separated and identified." "And the reason is," says Strong, J., in Crofoot v. Bennett, 2 Com. 258 (a case much like the one before us), "that the sale cannot apply to any article until it is clearly designated and its identity thus ascertained."

In Woods v. McGee, 7 Ohio 467, the earlier and more recent English decisions upon this subject are examined, and it is shown that the later cases adhere to the settled principle, that where a part of an individual mass of property is sold it is necessary that some further act should be done, specifying and identifying the part sold, before the action of trover will lie. See 12 East. 614; 5 Taunt 176; 2 M. & S. 397.

Mr. Story, in his work on Sales, § 296, says: "No sale is complete, so as to vest in the vendee an immediate right of property, so long as anything remains to be done between the buyer and seller in relation to the goods. The goods sold must be separated and identified by marks or numbers, so as to be completely distinguished from all other goods, or from the bulk or mass with which they happen to be mixed. If they be sold by weight, or measure, or numbers, the specific quantity bought

must be weighed, or counted or measured, so as to be separate and distinct from all similar goods." And to the same effect is Story on Cont., § 504, and see McDonald v. Hewett, 15 John. 350; Biddle v. Varnum, 20 Pick. 280; Sumner v. Hawlett, 12 Ib. 82.

We have thus, from different authors and cases presented, in a condensed form, the general principle which now obtains, and which, in the language of Grimke, J., 7 Ohio, supra: "Looking to every combination of circumstances, establishes a rule, which should be liable to as little fluctuation as possible." Guided by this rule, was there such a delivery of this property as passed the title to plaintiffs, and such a consequent right to the possession as that they can maintain this action?

This action is replevin, and in it plaintiffs claim a right to the possession of a specific and definite 25,000 brick. If they had bought the whole kiln, had the possession and control of the same been delivered to them, then the entire article being sold, the title would pass, though it might have been afterward necessary to count them in order to ascertain the price of the whole at the rate per thousand fixed by the contract. Thus, to take an illustration often used, if a flock of sheep be sold at so much per head and it be agreed that they shall be counted after the sale, to determine the entire amount, the sale is held to be valid and complete. But if a given number out of the whole flock are sold, no title is acquired until they are separated and their identity ascertained. So in this case, if there has been a sale of the two arches on the west end of the kiln, for a gross sum, without reference to the number of brick therein, we think the title might have passed without an actual separation of such arches from the balance of the kiln. It is known that these kilns are so constructed that each arch stands by itself, at least to such an extent as that it can readily be ascertained and determined where one closes and the construction of another commences. This being the case, it can be seen at once that these two arches could be as readily distinguished from the entire kiln as could all the sheep in one of several pens, or the barrels of flour in a specified room of a warehouse containing several apartments, all filled with flour.

The facts in this case, however, are different from either of those supposed, and so radically different that we do not see

that it can be brought within the principle governing them. Plaintiffs were to have 25,000 brick from the west end of the kiln, and they bring replevin upon the ground that this number of brick was so specifically set apart to them, or that this was so susceptible of being done by the officer that their identification is entirely certain and possible.

We cannot think so. The brick were left in the kiln untouched and their position unchanged. Somewhere in the third arch, taking the calculation made to be correct, was the dividing line, which was to divide plaintiff's brick from those of Moore. Where this was, however, there was nothing to indicate, nor could it be shown until there was a count, and the 25,000 definitely ascertained. There was no pretense that in counting out the number sold, two or three arches would be taken, no more and no less; nor yet that it was known to what row in any arch this number would extend. And much less could it be known to what brick in a particular row. And thus, as it seems to us, there was no such separation or identification of the article sold as to completely distinguish it from the bulk or mass with which it was connected. There was no such counting of the brick, the specific quantity bought, as to place them separate and distinct from the balance of the kiln. And if there was not, the delivery was incomplete, as we understand the authorities, and the title did not vest in plaintiff.

Judgment reversed.

Sale of Portion of Mass in Terms of a Definite Quantity.

KIMBERLY et al. v. PATCHIN.

19 New York 330. 1859.

Appeal from the Supreme Court. Action to recover the value of 6,000 bushels of wheat, alleged to have been the property of the plaintiffs, and to have been converted by the defendant. Upon the trial before Mr. Justice Greene, at the Erie Circuit, it was proved that one Dickinson had in warehouse, at Littlefort, in Wisconsin, two piles of wheat, amounting to 6,249 bushels. John Shuttleworth proposed to purchase 6,000 bushels of wheat. Upon being shown the piles, he expressed a doubt whether they contained that quantity. Dickinson declared his opinion that

they did, and agreed to make up the quantity if they fell short. A sale was then made at seventy cents per bushel, Dickinson signing and delivering to Shuttleworth a memorandum, as follows:

Littlefort, February 17, 1848.

John Shuttleworth Bought of D. O. Dickinson

6,000 bushels of wheat, delivered on board, 70 cents..$4,200

Received his draft upon John Shuttleworth, of

Buffalo, for.....$2,100

To remit me..... 1,600

Five drafts of $100 each..... 500

——— 4,200

D. O. Dickinson.

He also signed and delivered to Shuttleworth this paper, viz.:

Littlefort, February 18, 1848.

6,000 bushels wheat.

Received in store 6,000 bushels of wheat, subject to the order of John Shuttleworth, free of all charges, on board.

D. O. Dickinson.

The wheat was left undisturbed in the warehouse. Shuttleworth sold the wheat to the defendant, assigning to him the bill of sale and warehouse receipt. Dickinson shortly afterwards sold the whole quantity of wheat in the two piles to a person under whom the plaintiffs derived title. The defendant having obtained the possession of the wheat, this action was brought. The judge, under exception by the defendant, directed a verdict for the plaintiffs, which was rendered, and the judgment thereon having been affirmed at General Term, in the eighth district, the defendant appealed to this court.

COMSTOCK, J. Both parties trace their title to the wheat in controversy to D. O. Dickinson, who was the former owner, and held it in store at Littlefort, Wisconsin. The defendant claims through a sale, made by Dickinson to one Shuttleworth on the 18th of February, 1848. If that sale was effectual to pass the title, it is not now pretended that there is any ground on which the plaintiffs can recover in this suit. The sale to the person under whom they claim was about two and a half months junior in point of time.

The sale to Shuttleworth was by a writing in the form of a present transfer of 6,000 bushels of wheat, at seventy cents per bushel. No manual delivery was then made, but instead thereof the vendor executed and delivered to the vendee another instrument, declaring that he had received in store the 6,000 bushels subject to the vendee's order; of the price $2,600 was paid down, and the residue $1,600, which was to be paid at a future day, the purchaser afterwards offered to pay, according to the agreement. So far the contract had all the requisites of a perfect sale. The sum to be paid by the purchaser was ascertained, because the number of bushels and the price per bushel were specified in the contract. Although the article was not delivered into the actual possession of the purchaser, yet the seller, by the plain terms of his agreement, constituted himself the bailee, and henceforth stood in that relation to the purchaser and to the property. That was equal in its results to the most formal delivery, and no argument is required to show that the title was completely divested, unless a difficulty exists yet to be considered.

The quantity of wheat in store to which the contract related was estimated by the parties at about 6,000 bushels. But subsequently, after Dickinson made another sale of the same wheat to the party under whom the plaintiffs claim, it appeared on measurement that the number of bushels was 6,249, being an excess of 249 bushels. When Shuttleworth bought the 6,000 bushels, that quantity was mixed in the storehouse with the excess, and no measurement or separation was made. The sale was not in bulk, but precisely of the 6,000 bushels. On this ground it is claimed, on the part of the plaintiffs, that in legal effect the contract was executory, in other words a mere agreement to sell and deliver the specified quantity, so that no title passed by the transaction. It is not denied, however, nor does it admit of denial, that the parties intended a transfer of the title. The argument is, and it is the only one which is even plausible, that the law overrules that intention, although expressed in plain written language, entirely appropriate to the purpose.

It is a rule asserted in many legal authorities, but which may be quite as fitly called a rule of reason and logic as of law, that in order to an executed sale, so as to transfer a title from one party to another, the thing sold must be ascertained. This is

a self-evident truth, when applied to those subjects of property which are distinguishable by their physical attributes from all other things, and, therefore, are capable of exact identification. No person can be said to own a horse or a picture, unless he is able to identify the chattel or specify what horse or what picture it is that belongs to him. It is not only legally, but logically, impossible to hold property in such things, unless they are ascertained and distinguished from all other things; and this, I apprehend, is the foundation of the rule that, on a sale of chattels, in order to pass the title, the articles must, if not delivered, be designated, so that possession can be taken by the purchaser without any further act on the part of the seller.

But property can be acquired and held in many things which are incapable of such an identification. Articles of this nature are sold, not by a description which refers to and distinguishes the particular thing, but in quantities, which are ascertained by weight, measure, or count; the constituent parts which make up the mass being undistinguishable from each other by any physical difference in size, shape, texture, or quality. Of this nature are wine, oil, wheat, and the other cereal grains, and the flour manufactured from them. These can be identified only in masses or quantities, and in that mode, therefore, they are viewed in the contracts and dealings of men. In respect to such things, the rule above mentioned must be applied according to the nature of the subject. In an executed and perfect sale, the things sold, it is true, must be ascertained. But as it is not possible in reason and philosophy to identify each constituent particle composing a quantity, so the law does not require such an identification. Where the quantity and the general mass from which it is to be taken are specified, the subject of the contract is thus ascertained, and it becomes a possible result for the title to pass, if the sale is complete in all its other circumstances. An actual delivery indeed cannot be made unless the whole is transferred to the possession of the purchaser, or unless the particular quantity sold is separated from the residue. But actual delivery is not indispensable in any case in order to pass a title, if the thing to be delivered is ascertained, if the price is paid or a credit given, and if nothing further remains to be done in regard to it.

It appears to me that a very simple and elementary inquiry

lies at the foundation of the present case. A quantity of wheat being in store, is it possible in reason and in law for one man to own a given portion of it and for another man to own the residue without a separation of the parts? To bring the inquiry to the facts of the case: in the storehouse of Dickinson there was a quantity not precisely known. In any conceivable circumstances could Shuttleworth become owner of 6,000 bushels, and Dickinson of the residue, which turned out to be 249 bushels, without the portion of either being divided from the other? The answer to this inquiry is plain. Suppose a third person, being the prior owner of the whole, had given to S. a bill of sale of 6,000 bushels, and then one to D. for the residue more or less, intending to pass to each the title, and expressing that intention in plain words, what would have been the result? The former owner most certainly would have parted with all his title. If, then, the two purchasers did not acquire it, no one could own the wheat and the title would be lost. This would be an absurdity. But if the parties thus purchasing could and would be the owners, how would they hold it? Plainly according to their contracts. One would be entitled to 6,000 bushels, and the other to what remained after that quantity was subtracted.

Again suppose, Dickinson having in store and owning 249 bushels, Shuttleworth had deposited with him 6,000 bushels for storage merely, both parties agreeing that the quantities might be mixed. This would be a case of confusion of property where neither would lose his title. In the law of bailments it is entirely settled that S., being the bailor of the 6,000 bushels, would lose nothing by the mixture, and, it being done by consent, it is also clear that the bailee would lose nothing. Story on Bailments, § 40; 2 Bl. Com. 405.

These and other illustrations which might be suggested demonstrate the possibility of a divided ownership in the 6,249 bushels of wheat. If, then, the law admits that the property, while in mass, could exist under that condition, it was plainly competent for the parties to the sale in question so to deal with each other as to effectuate that result. One of them being the owner of the whole, he could stipulate and agree that the other should thenceforth own 6,000 bushels without a separation from the residue. And this I think is precisely what was done. The 6,000 bushels might have been measured and delivered to the purchaser, and

then the same wheat might have been redelivered to the seller under a contract of bailment. In that case the seller would have given his storehouse receipt in the very terms of the one which he actually gave; and he might, moreover, have mixed the wheat thus redelivered with his own, thereby reducing the quantity sold and the quantity unsold again to one common mass. Now the contract of sale and of bailment, both made at the same time, produced this very result. The formalities of measurement and delivery pursuant to the sale, and of redelivery according to the bailment—resulting in the same mixture as before—most assuredly were not necessary in order to pass the title, because these formalities would leave the property in the very same condition under which it was in fact left; that is to say, in the actual custody of the vendor, and blended together in a common mass. Those formal and ceremonial acts were dispensed with by the contract of the parties. They went directly to the result without the performance of any useless ceremonies, and it would be strange, indeed, if the law denied their power to do so. * * *

None of the decisions announce the extreme doctrine that where, in such cases, the parties expressly declare an intention to change the title, there is any legal impossibility in the way of that design. Upon a simple bill of sale of gallons of oil or bushels of wheat, mixed with an ascertained and defined larger quantity, it may or may not be considered that the parties intend that the portion sold shall be measured before the purchaser becomes invested with the title. That may be regarded as an act remaining to be done, in which both parties have a right to participate. But it is surely competent for the vendor to say in terms that he waives that right, and that the purchaser shall become at once the legal owner of the number of gallons or bushels embraced in the sale. If he cannot say this effectually, then the reason must be that two men cannot be owners of separate quantities or proportions of an undistinguishable mass. That conclusion would be a naked absurdity, and I have shown that such is not the law. In the case before us the vendor not only executed his bill of sale professing to transfer 6,000 bushels of wheat, but, waiving all further acts to be done, in order to complete the transaction, he acknowledged himself, by another instrument, to hold the same wheat in store as the bailee thereof

for the purchaser. If his obligations from that time were not simply and precisely those of a bailee, it is because the law would not suffer him to stand in that relation to the property for the reason that it was mixed with his own. But no one will contend for such a doctrine.

I repeat it is unnecessary to refer to all the cases, or to determine between such as may appear to be in conflict with each other. None of them go to the extent of holding that a man cannot, if he wishes and intends so to do, make a perfect sale of part of a quantity without actual separation, where the mass is ascertained by the contract and all parts are of the same value and undistinguishable from each other. * * *

We are of opinion, therefore, both upon authority and clearly upon the principle and reason of the thing, that the defendant, under the sale to Shuttleworth, acquired a perfect title to the 6,000 bushels of wheat. Of that quantity he took possession at Buffalo, by a writ of replevin against the master of the vessel in which the whole had been transported to that place. For that taking the suit was brought and it results that the plaintiff cannot recover. It is unnecessary to decide whether the parties to the original sale became tenants in common. If a tenancy in common arises in such cases, it must be with some peculiar incidents not usually belonging to that species of ownership. I think each party would have the right of severing the tenancy by his own act; that is, the right of taking the portion of the mass which belonged to him, being accountable only if he invaded the quantity which belonged to the other. But assuming that the case is one of strict tenancy in common, the defendant became the owner of 6,000 and the plaintiffs of 249 parts of the whole. As neither could maintain an action against the other for taking possession merely of the whole, more clearly he cannot if the other takes only the quantity which belongs to him.

The judgment must be reversed and a new trial granted.

GRAY AND GROVER, JJ., dissented; STRONG, J., expressed himself as inclined to concur, if necessary to a decision, but it being unnecessary, he reserved his judgment.

Judgment reversed and new trial ordered.

CHAPTER V.

SALES ON CONDITION.

Contract to Sell on Condition.

HUNT v. WYMAN.

100 Mass. 198. 1868.

Contract on an account annexed for $250 as the price of a horse. Writ dated September 5, 1867. Answer, a general denial.

At the trial in the superior court, before Morton, J., the plaintiff testified that he had a horse for sale, and on the evening of August 12, 1867, the defendant looked at it and inquired the price, and was told $250; that the defendant said nothing further about price, but asked the character of the horse, and was told that the horse was six years old, sound, kind, and afraid of nothing but goats; that the defendant wished to take the horse to try it, and at this the plaintiff hesitated, and the defendant then told him that "if he would let him take the horse and try it, if he did not like it he would return it, in as good condition as he got it, the night of the day he took it," to which the plaintiff assented; and that the next day the defendant sent his servant and took the horse from the plaintiff about eleven o'clock in the forenoon.

The plaintiff further testified that the horse was taken for the purpose of trying it; that a short time after it was taken a message was brought to him, that, before it reached the defendant's place, it escaped from the servant, ran away and was injured; that on receiving the message he went to the stable where the horse was and found it injured so severely that it could not be used or removed prudently; that, on account of the injury, the defendant had no opportunity to try the horse; that he did not expect that the defendant would finally take the horse until after he had tried it; that the defendant had neither

returned the horse nor offered to return it; and that the plaintiff had nothing to do with the horse since he put it in charge of the defendant's servant. There was no evidence, and it was not contended by the plaintiff, that the horse was injured by fault of the defendant or his servant.

The judge ruled that the plaintiff could not maintain his action on this evidence, and directed a verdict for the defendant, which was returned; and the plaintiff thereupon alleged exceptions to the ruling.

WELLS, J. Upon the facts stated in this case, there was a bailment and not a sale of the horse. The only contract, aside from the obligations implied by law, must be derived from the statement of the defendant that, if the plaintiff "would let him take the horse and try it, if he did not like it he would return it in as good condition as he got it." This contract, it is true, is silent as to what was to take place if he should like it, or if he should not return it. It may perhaps be fairly inferred that the intent was that if he did like the horse he was to become the purchaser at the price named. But, even if that were expressed, the sale would not take effect until the defendant should determine the question of his liking. An option to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case the title will not pass until the option is determined; in the other the property passes at once, subject to the right to rescind and return.

A mere failure to return the horse within the time agreed may be a breach of contract, upon which the plaintiff is entitled to an appropriate remedy; but has no such legal effect as to convert the bailment into a sale. It might be evidence of a determination, by the defendant, of his option to purchase. But it would be only evidence. In this case, the accident to the horse, before an opportunity was had for trial in order to determine the option, deprives it of all force, even as evidence.

This action, being founded solely upon an alleged sale of the horse for an agreed price, cannot be maintained upon the evidence reported.

Exceptions overruled.

CHAPTER VI.

TITLE RESERVED FOR SECURITY.

Risk of Loss.

TUFTS v. GRIFFIN.

107 N. C. 47, 12 S. E. 68. 1890.

SHEPHERD, J. This is a case of first impression in this State. We have here an absolute promise of the defendant to pay the plaintiff a certain sum, it being the balance of the purchase money due the plaintiff upon the sale of a soda apparatus to the defendant. The sale was a conditional one, see Clayton v. Hester, 80 N. C. 275; Frick v. Hilliard, 95 N. C. 117, and the cases cited; and, under the contract, the defendant took the apparatus into his possession, and used it in all respects as his own. Without any negligence on the part of the defendant and before any default in the payment of the purchase money, the property was destroyed by fire.

The question is, who shall bear the loss? The defendant insists that it should fall upon the plaintiff because the transaction amounted to nothing more than an executory agreement to sell, and that, inasmuch as the plaintiff cannot now perform the contract, the defendant should not be compelled to pay. It is very true that such contracts are sometimes called "executory," as in the case of Ellison v. Jones, 4 Ired. 48, and the vendee is also termed a "bailee," Perry v. Young, 105 N. C. 466; but it must be observed that these expressions are used in reference to the strict, legal title to the property, and they can therefore have no influence in the determination of the present question, which is purely one of considerations for an absolute promise to pay.

The recent decision in Burnley v. Tufts, 66 Miss. 49, is directly in point. There, it seems, that this same plaintiff sold a soda apparatus under a contract precisely similar to this, and the property was destroyed, as in this case, after some of the notes

had been paid, and before the maturity of the others. The court decided that the plaintiff was entitled to recover the amount due upon the remaining notes. As we entirely concur in the reasoning upon which the decision is based, we will reproduce a part of the language of the opinion. The court says: "Burnley unconditionally and absolutely promised to pay a certain sum for the property, the possession of which he received from Tufts. The fact that the property has been destroyed while in his custody, and before the time for the payment of the note last due, on payment of which only his right to the legal title of the property would have accrued, does not relieve him of payment of the price agreed on. He got exactly what he contracted for, viz., the possession of the property, and the right to acquire an absolute title by payment of the agreed price. The transaction was something more than an executory conditional sale. The seller had done all he was to do except to receive the purchase price. The purchaser had received all that he was to receive as the consideration of his promises to pay. The inquiry is not whether, if he had foreseen the contingency which has occurred, he would have provided against it, nor whether he might have made a more prudent contract; but it is whether by the contract he has made his promise absolute or conditional. The contract was a lawful one, and, as we have said, imposed upon the buyer an absolute obligation to pay. To relieve him from this obligation, the court must make a new agreement for the parties, instead of enforcing the one made, which it cannot do."

As is said in the foregoing extract, the vendor has done all that he was required to do, and the transaction amounted to "a conditional sale to be defeated upon the non-performance of the conditions. * * * The vendee had an interest in the property which he could convey, and which was attachable by his creditors, and which could be ripened into an absolute title by the performance of the conditions." 1 Whart. Cont., § 617. The vendee had the actual, legal, and rightful possession with a right of property upon the payment of the money. Vincent v. Cornell, 13 Mass. 296. The vendor could not have interfered with this possession "until a failure to perform the conditions." Newhall v. Kingsbury, 131 Mass. 445. Having acquired these rights, under the contracts, and the property having been subjected to the risks incident to the exercise of the exclusive right

of possession, it would seem against natural justice to say that there was no consideration for the promise, and that the loss should fall upon the plaintiff.

The case of Swallow v. Emery, 111 Mass. 356, cited by the defendant, may, perhaps, be distinguished from ours, because it was agreed that, upon the payment of the price, the vendor was to execute a bill of sale to the vendee. However this may be, we think that the principles enunciated in Burnley v. Tufts, supra, are better sustained, both by reason and authority, and we therefore affirm the judgment of the court below.

No error.

CHAPTER VII.

BILLS OF LADING.

A Representative of the Goods.

FIRST NAT. BANK OF CAIRO v. CROCKER et al.

111 Mass. 163. 1872.

Tort against James B. Crocker, Jr., Charles L. Smith, and Edward F. Smith, copartners under the style of Crocker, Smith & Company, for the conversion of 100 barrels of flour. * * * Ayers & Company, as flour merchants, had had dealings with the defendants who were commission merchants in Boston, since 1869, the defendants receiving flour on consignment from Ayers & Company, selling it in Boston, and having an open general commission account with them. On August 23, 1870, Ayers & Company consigned to the defendants a lot of flour, and drew on them for more than its value, writing at the same time, "We will make it all right in next shipment." The flour arrived, the defendants, on the strength of this promise of Ayers & Company, accepted and paid the draft, and the result of this and previous dealings was that Ayers & Company were indebted to them some four or five hundred dollars. On August 24, 1870, Ayers & Company shipped the 100 barrels of flour in dispute to Boston, taking from the carriers a bill of lading, which acknowledged the receipt of the flour, "consigned to shipper's order, Boston, Mass.," but in which, under the heading of "Marks and Consignees," was written "St. Louis Mills and Blackburn. For Crocker, Smith & Company, Boston, Mass." They then drew on the defendants for $500, attached to the draft the bill of lading, indorsed by them in blank, and discounted the draft at the Bank of Commerce in St. Louis. The bank presented the draft to the defendants, who refused to accept it, and it was returned with the bill of lading to the bank, who returned it to Ayers & Company, by whom it was taken up. On August 30,

1870, Ayers & Company wrote to the defendant, "We trust you have reconsidered the matter and accepted the draft."

On September 12, 1874, the 100 barrels of flour arrived in Boston, by the Boston & Albany Railroad, accompanied by a way bill in which, under the heading of "Consignee," was written "Crocker, Smith & Company, Boston." The flour was delivered on the same day by the railroad company to the defendants, who paid the freight, and on September 20, sold the flour and applied the proceeds on their account with Ayers & Company.

On September 14, 1870, Ayers & Company drew a draft for $400, purporting to be on account of the 100 barrels of flour, upon Goodwin, Locke & Company, of Boston, in favor of the plaintiffs, attached the bill of lading to the draft, and delivered the draft and bill of lading to the plaintiffs; and the plaintiffs discounted the draft. The draft was accepted by Goodwin, Locke & Company, upon presentment on September 21, and was paid when due.

There was evidence that when the bill of lading was delivered to the plaintiffs it was indorsed in blank by Ayers & Company, but it appeared that when it was forwarded by the plaintiffs the words "Deliver within named flour to Goodwin, Locke & Company, or order," were written above the indorsement of Ayers & Company. * * *

AMES, J. It is manifest that the flour was not placed in the hands of these defendants for the purpose of securing an existing debt, or indemnifying them for any advances that they had made. It was not consigned to them in order that it might be sold, and the proceeds carried to the credit of Ayers & Co. in general account current. It is true that the consignors knew that they had overdrawn their account, and that they had expressly promised to "make it all right" at the next shipment. But that was an executory contract. The proposed correction stood wholly in agreement. A general promise to make the matter right was not of itself sufficient to vest in the defendants a title as absolute owners, even of the goods forwarded at the next shipment, unless the circumstances indicated, or at least were consistent with, such an intention on the part of the shippers. But in this case, the consignment and the draft constituted one

transaction. The bill of lading and the draft came together; and the defendants understood that the flour was sent to them, subject to a claim of $500 in favor of the holder of the draft. They were to receive it upon the trust that they were to pay that amount out of the proceeds. The meaning of the transaction on the part of the shippers was that the defendants were to receive it for that purpose and upon that understanding only. It was as if they had said, "You may take this flour and sell it on our account, provided you will accept this draft." A bill of lading indorsed is only prima facie evidence of ownership, and is open to explanation. Pratt v. Parkman, 24 Pick. 42. This bill of lading was provisional, and was not intended to vest the property in the defendants, or to authorize their taking possession of it, except upon the condition of their acceptance of the draft. Allen v. Williams, 12 Pick. 297.

The act of the defendants, therefore, in taking possession of the flour was wholly unauthorized, and gave them neither valid title nor lawful possession. Allen v. Williams, ubi supra. In proceeding afterwards to sell it as if it were their own, and appropriating the proceeds, they were guilty of a wrongful conversion. A carrier may be a mere bailee for the consignor; and where by the terms of the bill of lading the goods are to be delivered to the consignor's order, the carrier is his agent, and not the consignee's. Moakes v. Nicholson, 19 C. B. N. S. 290; Baker v. Fuller, 21 Pick. 318; Merchants' National Bank v. Bangs, 102 Mass. 292. On the refusal of the consignee to receive the goods upon the terms and for the purposes for which they were sent, he cannot take them for any other purpose. Shepherd v. Harrison, L. R. 5 H. L. 116; De Wolf v. Gardner, 12 Cush. 23; Allen v. Williams, 12 Pick. 297. The title to the flour therefore remained in the shipper, wholly unaffected by the consignment. Even in the case of a contract of sale, the fact of making the bill of lading deliverable to the order of the vendor, when not rebutted by evidence to the contrary is decisive to show his intention to preserve the jus disponendi, and to prevent the property from passing to the vendee. Wait v. Baker, 2 Exch. 1; Van Casteel v. Booker, Id. 691. The case of a mere consignment to an agent would be, of course, still stronger.

Upon the refusal of the defendants to accept the consignment upon the terms proposed, which refusal was sufficiently mani-

fested by the protest of the draft and the return of the bill of lading, the owners of the flour, Ayers & Company, had a right to seek a new consignee, and to make another attempt to obtain an advance by a draft to be charged against the property. An arrangement was accordingly made with the plaintiffs, who discounted their draft of $400 upon the security of the same bill of lading that had been sent to the defendants and returned by them. If this bill of lading was delivered to the plaintiffs, indorsed in blank by Ayers & Co. (and there is testimony to that effect), the transaction would operate as a transfer of their title in the flour to the plaintiffs, if such were the intention of the parties. As the property was at that time in Boston, it was, of course, incapable of actual delivery at Cairo, and the delivery of the evidence of title, with the indorsement upon the bill of lading, was all that could be done for the transfer of the property from the general owner to the new purchaser; but it would be effectual for that purpose. Conrad v. Atlantic Ins. Co., 1 Pet. 386, 445; Gibson v. Stevens, 8 How. 384; Bryans v. Nix, 4 M. & W. 775, 791; Low v. De Wolf, 8 Pick. 101; Gardner v. Howland, 2 Pick. 599; Stanton v. Small, 3 Sandf. 230; Pratt v. Parkman, 24 Pick. 42. In Gibson v. Stevens, the court says, per Taney, C. J.: "This rule applies to every case where the thing sold is, from its character or situation at the time, incapable of actual delivery." To the extent of their advance of money upon the draft, therefore, the plaintiffs would be considered as purchasers, and they would acquire a special property in the flour for the purpose of protecting the draft. At the time of this transaction, the flour remained in the possession of the defendants, and, with the exception of taking possession, nothing had been done on their part amounting to a wrongful conversion of it to their own use. They had not put it out of their power to replace the shippers in the enjoyment of their rights.

It appears from the report, that, when the bill of lading was forwarded the second time, the name of the firm of Goodwin, Locke & Co. was written over the indorsement of Ayers & Co. But we do not think that this fact, whether the blank indorsement were filled up after or before the discount of the draft, would materially affect the plaintiff's rights. The bill of lading was attached to the draft, and the substance of the transaction was that the draft was discounted upon the security of the mer-

chandise itself. It purports to be on account of the barrels of flour described in the bill of lading. The flour, although intrusted to Goodwin, Locke & Co. to sell, was appropriated to the specific purpose of the payment of this draft. The bill of lading was put in the plaintiffs' hands to enable them to hold the merchandise as their security, and the discounting of the draft was the consideration for the transfer of the property to them. It was convenient so to indorse the bill of lading, as to make it manifest that Goodwin, Locke & Co. were to receive and dispose of the goods; but they were to do so as trustees and agents of the plaintiffs, and not as proprietors in their own right. They certainly acquired no title in the property until they had accepted the draft, and when that event happened the goods had been disposed of by the defendants, and had gone into the hands of bona fide holders without notice, so as to be beyond recall. The effect of this transaction between the plaintiffs and Ayers & Co. was that the flour was designated to stand as collateral security for the draft. If the draft had not been accepted, the plaintiffs clearly would not have lost their title to the flour. It is not necessary to hold that the plaintiffs became absolute owners of the property; it is enough that they had a right of property and possession to secure the payment of the draft, and the right of Ayers & Co., as former owners of the specific property had become divested, leaving them only a right in the surplus money which might remain after a sale of the flour and a payment of the draft from the proceeds.

We have then in this case an intent of the general owners of the flour to make use of it as a security for an advance of money from the plaintiffs; a delivery of the bill of lading in pursuance of that intent; and a valuable and executed consideration in the discounting of the draft. The fact that the goods were in the custody of the defendants would not prevent this arrangement from having the effect to transfer the title of Ayers & Co. to the plaintiffs. Whipple v. Thayer, 16 Pick. 25; McKee v. Judd, 2 Kern. 622. Whether it should be regarded as a sale, a pledge, or a mortgage, there was a sufficient delivery to give to the plaintiffs a special property, which they could enforce by suit against any wrongdoer. They had a right to transfer the property, subject to the same trusts upon which they held it themselves, to their correspondent or agent in Boston, and it may well be that,

if the draft had been accepted by Goodwin, Locke & Co. before the flour had been sold and placed out of their reach, they would have been the proper parties to have brought this action. But the transfer to them for that reason wholly failed to take effect, and they acquired no title to the flour specifically. If they had accepted the draft before the flour had been sold to a bona fide purchaser, the case would have been almost exactly like Allen v. Williams, above cited. That was a case in which the consignee of merchandise refused to accept the draft which accompanied the bill of lading, and took possession of the merchandise, claiming as in this case the right to do so in order to secure a balance due to him from the consignor. The court held that a new consignee could maintain trover against him.

Our conclusion then is, that at the time of the sale of the flour by the defendants, the plaintiffs had a right and property in it, which, whether general or special, and whether as purchasers, trustees, pledgees, or mortgagees, gave them a right of possession as against all wrongdoers; and that the defendants had no title whatever and were mere wrongdoers. The fact that the draft has been paid by the new consignees does not prevent the plaintiffs from maintaining the action for the benefit and protection of the acceptors of the draft, who without fault of their own have been deprived of the security upon which it was discounted.

Judgment for the plaintiffs.

Extent of Negotiability.

STOLLENWERCK et al. v. THACHER et al.

115 Mass. 224. 1874.

Tort for the conversion of 189 bales of cotton. At the trial, before Morton, J., the jury were directed to find a verdict for the plaintiffs, and the case was reported for the consideration of the full court and is stated in the opinion.

GRAY, C. J. This is an action of tort for the conversion of a number of bales of cotton. A verdict has been ordered for the plaintiffs, and the case reserved for the determination of the full court upon a report containing an abstract of the evidence

given at the trial, and a number of letters and documents. But the facts material to the decision, assuming all the controverted ones to be according to the testimony introduced by the defendants, are not many; and a brief statement of them will tend greatly to narrow the discussion of the principles of law by which the case is governed.

These plaintiffs, being buyers of cotton in Mobile, made an arrangement with Joseph I. Baker, a cotton broker in Boston, by which they agreed to pay him, upon such orders on them as he should obtain from his customers here, fifty cents a bale, out of their own commission of one and a half per cent., furnish him with types of their classification of cotton, and keep him advised at their own expense of the condition of the cotton market in Mobile; he agreed to procure and transmit the orders, and inform his customers of their acceptance or rejection; and the invoices were to be sent by the plaintiffs to, and the drafts for the price drawn upon, the customers, and the bills of lading attached to the drafts.

In pursuance of an order given him by Gorham Gray & Co., Baker telegraphed to the plaintiffs to buy for them two hundred bales of cotton. The plaintiffs replied, refusing to negotiate on any other basis than that the bill of lading should be attached to the draft. They bought the cotton in Mobile, drew a bill of exchange on Gray & Co. against the cotton, took the bill of lading in their own name, indorsed it in blank, attached it to the bill of exchange, procured the latter to be discounted at a bank in Mobile, informed Baker of what they had done, and instructed him, on receiving the draft and bill of lading, to hold the bill of lading until the draft was paid. Baker by telegram and letter assented to all this. The invoice sent by the plaintiffs to Gray & Co. showed that the cotton was consigned to the plaintiffs' order. The Mobile bank transmitted the draft, with the bill of lading attached, to a bank in Boston, which presented the draft to Gray & Co. for acceptance. Upon such presentment, Gray & Co. asked for the bill of lading, and were told that Baker was to receive it. Gray & Co. then accepted the draft, the bank delivered the bill of lading to Baker, and he afterwards delivered it to Gray & Co., who obtained the cotton from the carriers, gave them a check for the amount of the freight from Mobile to Boston, and pledged the cotton and delivered the bill of lading to

the defendants as security for the payment of advances on the cotton. Gray testified that he accepted the draft upon Baker's assurance that he would hand him the bill of lading as soon as it came to Baker's possession, that Baker shortly afterwards delivered to him the bill of lading unconditionally, and that he transferred the cotton to the defendants believing that he owned it; and his testimony though contradicted by Baker's, must be assumed to be true for the purpose of deciding whether a verdict was rightly ordered for the plaintiffs.

Baker and the plaintiffs were not partners as between themselves, and Gray & Co. did not deal with Baker as a partner of the plaintiffs. His relation to the plaintiffs was that of a broker only. He looked to them, and not to the cotton for the payment of his commission. * * * Baker was not a factor, or a general agent intrusted with the goods for the purpose of sale; but a special agent, with positive and restricted instructions to receive the bill of lading on the acceptance of the draft, hold the bill of lading and the cotton until the draft was paid, and then deliver them to Gray & Co. He had no right of possession of the bill of lading or the cotton for any other purpose, and no title in or lien on the cotton. This is not a case of stoppage in transitu. Gray & Co. were not named in the bill of lading as consignees of the cotton, and the plaintiffs have never been divested of their property in the cotton as against Gray & Co. or any persons claiming under them.

The numerous cases cited at the bar differ in their circumstances rather than in the statement of principles. A bill of lading, even when in terms running to order or assigns, is not negotiable, like a bill of exchange, but a symbol or representative of the goods themselves; and the rights arising out of the transfer of a bill of lading correspond, not to those arising out of the indorsement of a negotiable promise for the payment of money, but to those arising out of a delivery of the property itself under similar circumstances. If the bill of lading is once assigned or indorsed generally by the original holder, upon or with a view to a sale of the property, any subsequent transfer thereof to a bona fide purchaser may indeed give him a good title as against the original owner. But so long as the bill of lading remains in the hands of the original party, or of an agent intrusted with it for a special purpose, and not authorized to sell or pledge the

goods, a person who gets possession of it without the authority of the owner, although with the assent of the agent, acquires no title as against the principal. National Bank of Green Bay v. Dearborn, ante, 219. Gurney v. Behrend, 3 E. & B. 622, 632. Pease v. Gloahec, L. R. 1 P. C. 219, 228.

In the present case, Baker, being a special agent authorized to deliver the bill of lading only upon payment of the bill of exchange drawn against the goods and attached to the bill of lading, could not bind his principals by a delivery made without such payment. To hold otherwise would be to allow a person intrusted with goods merely for the purpose of collecting the price and then delivering them, to sell them on credit. The authority of Baker, being special and limited, could not be enlarged by his own declarations. Mussey v. Beecher, 3 Cush. 511.

It follows that Gray & Co., not having paid the draft, nor acquired possession of the bill of lading with the plaintiffs' consent, had no property in the goods, and could convey none to the defendants, so as to defeat the plaintiffs' title. The plaintiffs are therefore entitled to recover. * * *

CHAPTER VIII.

VENDOR'S LIEN.

Agreements Inconsistent with Lien—Revival of Lien.

ARNOLD v. DELANO.

4 Cush. 33 (Mass.). 1849.

[Action of trover brought by the assignee in insolvency of Arthur Sowerby. The defendant had sold to Sowerby and Grant, partners, sixty-five cords of wood, which was measured off and marked with a stake to designate it from the rest. The wood was left on defendant's land, defendant giving six months credit and taking Sowerby's and Grant's note for the price and agreeing to give the buyers one year within which to remove the wood. Later the partnership was dissolved and as a part of the dissolution Grant conveyed to Sowerby all his right and title to the partnership property. At this time the partners, severally, as well as the partnership, were in fact insolvent. The plaintiff as assignee in insolvency of Sowerby demanded the wood from the defendant who refused to give it up until paid for it. After learning of the insolvency of the firm, defendant gave up the note which had been given for the price and received back the bill of sale which was held by the firm.]

SHAW, C. J. * * * There is manifestly a marked distinction between those acts, which, as between the vendor and vendee upon a contract of sale, go to make a constructive delivery and to vest the property in the vendee, and that actual delivery by the vendor to the vendee, which puts an end to the right of the vendor to hold the goods as security for the price.

When goods are sold, and there is no stipulation for credit or time allowed for payment, the vendor has by the common law a lien for the price; in other words, he is not bound actually to part with the possession of the goods, without being paid for them. The term "lien" imports, that by the contract of sale,

and a formal, symbolical or constructive delivery, the property has vested in the vendee; because no man can have a lien on his own goods. The very definition of a lien is, a right to hold goods, the property of another, in security for some debt, duty or other obligation. If the holder is the owner, the right to retain is a right incident to the right of property; if he have [has] had a lien, it is merged in the general property.

A lien for the price is incident to the contract of sale, when there is no stipulation therein to the contrary; because a man is not required to part with his goods, until he is paid for them. But conventio legem vincit; and when a credit is given by agreement, the vendee has a right to the custody and actual possession, on a promise to pay at a future time. He may then take the goods away, and into his own actual possession; and if he does so, the lien of the vendor is gone, it being a right incident to the possession.

But the law, in holding that a vendor, who has thus given credit for goods, waives his lien for the price, does so on one implied condition, which is, that the vendee shall keep his credit good. If, therefore, before payment, the vendee become bankrupt or insolvent, and the vendor still retains the custody of the goods, or any part of them; or if the goods are in the hands of a carrier, or middle-man, on their way to the vendee, and have not yet got into his actual possession, and the vendor, before they do so, can regain his actual possession, by a stoppage in transitu; then his lien is restored, and he may hold the goods as security for the price.

The principle we take to be well settled, but the difficulty which arises in practice,—one which has given rise to so many cases,—lies in determining what is such an actual change of possession from the vendor to the vendee, as shall be deemed to put an end to the vendor's lien. Some cases seem to be clear, and to illustrate the rule. If the goods are delivered to the vendee's own servant, agent, wagoner, or shipmaster, that is in law a delivery to the vendee himself. So if goods are stored in a common warehouse, as the dock warehouses at the London docks, and entered in the books as the property of A. B., and deliverable to him, and a dock warrant issued, and afterwards, upon the proper order of A. B. on the warrant, the whole or a part are transferred to C. D., and entered in like manner in his

name, this is an actual change of custody, control and possession, though the goods are not moved from their position. So, if the seller sustain different characters, as if a person, who is a livery stable keeper, having a horse to sell, makes a sale to C. D., and then transfers the horse to his livery stable, to be kept for C. D. at a stipulated weekly hire, this may be regarded as an actual change of custody and possession.

But by far the most common case which occurs, is where goods are ordered by letter, on credit, to be sent from one country to another, or from one part of the same country to another, and are accordingly forwarded by a common carrier. There, as the carrier is not the servant of the vendee, the goods, though they have left the actual possession of the vendor, if they have not reached the actual custody of the vendee, or the ultimate place of destination ordered by him, may be stopped in transitu by the vendor; and if he can thus stop them, he regains his lien.

Now to apply these rules to the present case: it appears to us very clear, that there was a good sale and delivery of the wood to Grant and Sowerby. The wood was measured and marked off, so that the very sticks composing the sixty-five cords could be identified. And the reason, why marking, measuring, weighing, etc., is necessary, is, that the particular goods may be identified. If ten barrels of oil are sold lying in a tank of thirty barrels, the buyer can identify no part of it as his, until it is measured. So, if fifty bales of cotton are sold out of one hundred, no particular bales are identified until separation. But, if they are capable of being identified, and by the contract of sale are identified, that is sufficient, and the property passes; as, if in the last case, there are one hundred bales of cotton, numbered from one to one hundred, and the contract is for the fifty odd numbers, or the fifty even numbers, or any other specified fifty numbers, the bales sold are identified though not separated. In the present case, the wood was marked off and identified, and the vendees had a license for one year to come on to the vendor's land and to take it away. This was a complete sale and a constructive delivery, so as to vest the property in Grant and Sowerby; and, on their dissolution and transfer, it vested in Sowerby, and by the assignment in his assignee. Then, the question is, whether the defendant had, under the circumstances, a lien for the price, and we think he had.

The purchasers had a license to go on to the defendant's land, and take the wood; whether this license was revocable or not, it is not necessary to consider, as it was not in fact revoked. But the vendees did not enter and take the wood; it remained on the vendor's land, and in his possession, in the same manner as before and at the time of the sale. The vendor acted in no new capacity; he was to receive nothing for keeping; he was precisely in the condition of a vendor, who had not parted with the possession and custody of the goods sold. And this was the state of things, when Sowerby went into insolvency; upon which event, we think, the vendor was remitted to his right to keep possession of the wood as security for the price. Such a vendor in possession is regarded as having a higher equity to retain for the price, than the assignee of a debtor, who has not paid for the property, has to claim it for the general creditors.

Sometimes a question may arise as to what constitutes an insolvency, and whether a mere stoppage of payment, and failure, in the popular sense, is sufficient. In this case, there is no doubt, because there was an insolvency declared by law, and a sequestration of all the vendee's property, under which this wood is claimed by the plaintiff.

If it might be supposed, that the giving of a note in this case was a payment, which would vary the case from that of a simple promise to pay for the wood, we think the answer is, that a promissory note, even if in form negotiable, whilst it remains in the hands of the vendor and not negotiated, but ready to be delivered up on the discharge of the lien, is regarded as the evidence in writing of a promise to pay for the goods purchased, and does not vary the rights of the parties. Thurston v. Blanchard, 22 Pick. 18.

The fact, that after the proceedings in insolvency commenced, and became known to the defendant, he applied to Sowerby and got up the bill of sale, cannot of itself, we think, avail the defendant. The insolvent could not, in that state, vacate the sale, or reconvey the property; and if the wood was worth more than the lien of the defendant upon it, we think that the assignee, on paying the defendant the price, was entitled to the wood for the benefit of the general creditors; and this was a right which the insolvent could not defeat. * * *

Judgment for the defendant.

CHAPTER IX.

STOPPAGE IN TRANSITU.

Insolvency of the Buyer.

LOEB & BRO. v. PETERS & BRO.

63 Ala. 243. 1879.

MANNING, J. Munter & Brother, being largely in debt, and insolvent, by an order requesting shipment to them, bought of plaintiffs, J. M. Peters & Brother, of Virginia, twenty-five boxes of tobacco, which they accordingly sent, as directed, to Munter & Brother, at Montgomery, Alabama, by railroad, forwarding to them by mail a bill of lading therefor. On receipt of this, several days before the boxes arrived, Munter & Brother indorsed it, and transferred their right to the goods to J. Loeb & Brother, who gave them credit for the same, on a debt past due, which Munter & Brother owed them. There was no other consideration for this transfer. Soon afterwards, Peters & Brother, being informed of the insolvency of Munter & Brother, and claiming the right to stop the tobacco in transitu, demanded it of the carrier, the South & North Alabama Railroad Company, and sued the same in detinue for it, having first offered to pay the freight money. Loeb & Brother intervened as claimants, and thereby obtained possession of the goods. Whereupon the suit was prosecuted against them to a verdict and judgment in favor of Peters & Brother, from which Loeb & Brother have appealed to this court.

We do not concur in the opinion expressed in Rogers v. Thomas, 20 Conn. 54, that a vendor of goods in transit to an insolvent vendee cannot stop them on the way, before delivery, unless the insolvency of the vendee occurred after the sale to him of the goods. We think, with the Supreme Court of Ohio, that the vendor may stop the goods upon a subsequent discovery of insolvency existing at the time of the sale, as well as upon

a subsequent insolvency. If there be a want of ability to pay, it can make no difference, in justice or good sense, whether it was produced by causes, or shown by acts, at a period before or after the sale. Benedict v. Schaettle, 12 Ohio St. 515; Reynolds v. Boston & M. R. R. Co., 43 N. H. 589; O'Brien v. Norris, 10 Md. 122; Blum v. Marks, 21 La. Ann. 268. The best definition of the right which we have seen, is that in Parson's Mercantile Law, as follows: "A seller, who has sent goods to a buyer at a distance, and, after sending them, finds that the buyer is insolvent, may stop the goods at any time before they reach the buyer. His right to do this is called the right of stoppage in transitu." Chap. X, p. 60.

If, before this right is exercised, the buyer sells the goods, and indorses the bill of lading for them to a purchaser in good faith, and for value, the right of the first vendor to retake them is extinguished. Lickbarrow v. Mason, 1 Smith's Lead. Cases, 388.

Evidence, therefore, that Loeb & Brother knew, when they took a transfer of the bill of lading, that Munter & Brother were insolvent, was relevant and proper to show, in connection with other testimony, that Loeb & Brother were not bona fide purchasers. And there was no error in permitting a witness to testify what one of that firm had previously said, tending to show such knowledge, when he was giving evidence in another cause. Statements and declarations, relevant to the matter in hand, which have been made by a party to a cause, may be proved against him, without his adversary being compelled to use such party as a witness in a suit in which he is interested.

The two judgments against Munter & Brother, in favor of creditors, confessed by the former before the tobacco had reached its destination, and the seizure upon execution the next day of property of Munter & Brother, by the sheriff, tended to prove their insolvency, and the evidence of those facts was, therefore, properly admitted.

The transfer of a bill of lading, as a collateral to previous obligations, without anything advanced, given up, or lost on the part of the transferee, does not constitute such an assignment as will preclude the vendor from exercising the right of stoppage in transitu. Said Bradley, Circuit Justice, in Lesossier v. The Southwestern, 2 Woods 35: "Nothing short of a bona fide sale

of the goods for value, or the possession of them by the vendee, can defeat the vendor's right of stoppage in transitu; and hence it has been held that an assignee in trust for creditors of the insolvent vendee is not a purchaser for value, and, consequently, takes subject to the exercise of any right of stoppage in transitu which may exist against the assignor. Harris v. Pratt, 17 N. Y. 249." Wherefore, it was held in the latter case that an attachment in the suit of the vendee's creditor, of goods landed by the carrier upon a wharf-boat at the place of delivery, did not prevent the vendor from stopping them in transitu. See, also, O'Brien v. Norris, 16 Md. 122; Naylor v. Dennie, 8 Pick. 199; Nicholls v. Le Feuvre, 2 Bingh. (N. C.) 83. The doctrine is based upon the plain reason of justice and equity, enunciated in D'Aguila v. Lambert, 2 Eden's Ch. 77, that "One man's property should not be applied to the payment of another man's debt."

The right itself is regarded as an extension merely of the lien for the price, which the seller of goods has on them while remaining in his possession, which lien the courts will not permit to be superseded, before the vendee, who has become insolvent, obtains possession, unless in the meantime the goods have been sold to a person who, in good faith, has paid value for them, and so would be a loser by his purchase, if that were held invalid. Appellants having only credited Munter & Brother on a debt previously due from them, with the price of the tobacco, have nothing more to do, in order to get even, than to debit them with the same sum, for the non-delivery of the goods in consequence of the defect in Munter & Brother's title.

The case of Crawford v. Kirksey, 55 Ala. 282, so much relied on by appellants, is wholly unlike this. The question of stoppage in transitu was in no way involved in it. The controversy there was, whether a conveyance by a debtor in a failing condition, of property which was indisputably and entirely his, in payment of a debt to one of his creditors, was not void as to the others; and this court decided that the law permitted such a preference, and that the transaction was not fraudulent in fact.

It results from what we have said, that there was no error in the charges to the jury.

Let the judgment of the circuit court be affirmed.

When Transit Ends.

BECKER v. HALLGARTEN.

86 N. Y. 167. 1881.

[The firm of Wilhelm & Boerner of Berlin sold to Boas & Stern of the same place three cases of goods on credit, and by the direction of the vendees the goods were sent Becker, the plaintiff, at Bremen. Boas & Stern then secured a loan on these goods from one Goldstein, giving the bill of lading as security and giving also an order upon Becker to hold the goods subject to Goldstein's order. Goldstein then directed Becker to ship the goods to the defendants at New York. Becker did so, naming himself as consignor. Later, Becker, acting in behalf of Wilhelm & Boerner, gave notice to stop the goods in transit, and the defendant agreed upon receipt of the goods to hold them for Wilhelm & Boerner, who then assigned their rights to Becker. Upon demand being made on the defendants they refused to surrender the goods to Becker, who then brought this action for conversion.]

DANFORTH, J. Becker was at no time in the course of these transactions the agent or representative of the vendors. Until and including the shipment of the goods he was the agent of Boas & Stern, the vendees, or of Goldstein. He obeyed, as was proper, at the different stages of the affair, first one and then the other of these parties. If his special character ceased with the shipment, he neither entered the employ of the vendors, nor did he act under any instruction received from them. The finding, therefore, that in behalf of the vendors he stopped the goods, is without evidence to support it. Assuming, in the next place (for the purpose only of this discussion), that by the assignment above set out, he became vested with a vendor's right to stop goods while on their way to an insolvent purchaser, it is one which, we think, cannot be exercised in this case, for the reasons: First, that the transit was over before the goods left Germany. They were sent by the vendors to Becker, as the vendees' agent at Bremen. The shipment was preceded by, and was in consequence of, a request by B. & S. to the vendors, "to send the boxes" to Becker "at our disposition." Therefore, on the 28th

of July, informing Becker of the shipment to him, "at the request of and for account of Messrs. B. & S., of Berlin," they write, we have sent you part of the goods in question, and "request you to carry out the further instruction of said parties concerning the same;" and in the next letter, communicating the shipment of the balance, they say, "and request you hereby to let Messrs. B. & S. have the further disposal thereof." It is obvious, then, that the impulse impressed upon the goods by the vendors carried them only to Bremen. Some other action was necessary on the part of the vendees before they moved again. They, at that point, transferred the goods to Goldstein, and made them, in the hands of Becker, subject to his order. The trial court finds not only a "taking of the goods by him as security," but that Boas & Stern "directed Becker to hold and ship the goods according to Goldstein's directions." This was done. The bills of lading were issued in favor of strangers to the vendees, and who represent a party having actual custody and the right of disposition. The shipment and the consignment by the vendors ended at Bremen. At that place new interests attached, in promotion of which the goods were sent forward. The only consignment by W. & B. was to Becker at Bremen.

It has been held that the delivery to the vendee, which puts an end to the state of passage, may be at a place where he means the goods to remain until a fresh destination is communicated to them by orders from himself. Valpy v. Gibson, 4 C. B. 837; Biggs v. Barry, 2 Curt. 259; Bolton v. L. & Y. R. W. Co., L. R. 1 Com. Pl. 439; also Dixon v. Baldwen, 5 East. 175; and this case is approved in Covell v. Hitchcock, 23 Wend. 611. In the case before us, it is plain that they had reached the place for which they were intended, under the direction given by the vendors, and had come under the actual control of the vendees. Dixon v. Baldwen, supra, is commented upon in Harris v. Pratt, 17 N. Y. 249, and distinguished from the rule thought applicable to the facts of that case. There the suspense in transportation was temporary, and to be resumed at a future time in the direction already given by the vendors. But, in the case before us, not only is the actual fact like that in Dixon v. Baldwen, but if the detention at Bremen was originally intended only to give the vendees an opportunity to determine by which of several routes, or at what time, as in Harris v. Pratt, the goods should go on,

we have the additional vital circumstance before adverted to of a complete possession and control by the vendees, and its transfer to a third party, who also took the actual possession and control of the goods, and has since retained them. Neither Harris v. Pratt nor any of the other cases cited by the appellant go to the extent of upholding the vendor's lien in such a case.

Second. The transaction between Goldstein and the vendees was effectual to pass the property to him and so deprive the vendors of the right of stoppage if it otherwise existed. That right may always be defeated by indorsing and delivering a bill of lading of the goods to a bona fide indorsee for a valuable consideration, without notice of the facts on which the right of stoppage would otherwise exist. This was held in Lickbarrow v. Mason, 2 T. R. 63, and has since been deemed established. It does not impair the force of this position that the money was in fact advanced before the delivery of the bill of lading. The goods were in the possession of Goldstein when he paid over the money. The bill of lading was promised and was part of the consideration on which the money was paid, but more than all, he had the right, under the authority given to him by B. & S., to take the bill of lading in any form, and it was made out for his benefit. City Bk. v. R. W. & O. R. R., 44 N. Y. 136. Nor is it material, unless made so by the German law, * * * that the bill of lading was not indorsed. It was not necessary that it should be. Hallgarten & Co. were Goldstein's agents, subject to his control, and in making the bill of lading in their names as consignees all was effected which the indorsement of a bill taken in the name of B. & S. would have accomplished. The cases cited by the respondent (Meyerstein v. Barber, L. R. 2 Com. Pl. 45; Short v. Simpson, 1 id. 255) show that a bill so indorsed has the same effect, even if the ship containing the goods was at sea, as delivery of the goods themselves. Here there was a delivery of the goods to Goldstein, and the bill of lading followed the possession. * * *

Judgment reversed.

CHAPTER XI.

C. O. D. SALES.

When Title Passes—Delivery to Carrier.

NORFOLK SOUTHERN R. R. CO. v. BARNES.

104 N. C. 25, 10 S. E. 83. 1889.

The National Buggy Company shipped over plaintiff's line four buggies, including the one in controversy, to Harrellsville, N. C., to be delivered to one W. J. Lassiter, upon his surrendering the bill of lading therefor. The plaintiff deposited the said buggies in its warehouse at Harrellsville, which was in charge and under the control of J. T. & B. F. Williams, the general freight agents of plaintiff at that point. Said Lassiter received possession of said buggies, including the one in suit, from a servant of plaintiff and their said agents. The said servant was permitted to keep the key to the warehouse, and at times to deliver freight to owners in the absence of the said agents. Lassiter did not surrender, or offer to surrender, the bill of lading when he obtained possession of the property, nor had he paid the freight. Lassiter's possession was known to said agents. They raised no objection thereto for two or three days, when they demanded possession, and Lassiter refused to surrender same. Lassiter was permitted to remain in possession for several weeks thereafter, at the expiration of which time he sold the buggy in question to the defendant for value, and without notice of any claim to the buggy by the plaintiff, or the manner and nature of Lassiter's possession. Lassiter was engaged in buying and selling buggies in Harrellsville, and this was within the knowledge of plaintiff and its agents. The buggy in controversy was worth $50. The court instructed the jury that upon this evidence plaintiff could not recover, if it was believed. There was verdict for defendant, judgment accordingly, and plaintiff appealed.

SHEPHERD, J. A. sells goods to B., and ships them by a

common carrier, to be delivered to B. upon the payment of the purchase money. By the negligence of the carrier B. obtains possession of the goods without paying the money, and sells them to C., a bona fide purchaser for value, and without notice. Can A. or his bailee, the carrier, recover the goods from C.? This construction of the case upon appeal was conceded by the appellee, and is the most favorable to the plaintiff that can be made; for we think it very clear that if the plaintiff was holding the goods only for the payment of its freight charges, its lien could not be enforced against the innocent purchaser. As soon as the goods were delivered to the carrier the right of property passed to the vendee, but the right of possession remained in the vendor until the price was paid. Ober v. Smith, 78 N. C. 313; Benj. Sales, 260. This possession he lost by the negligence of his agent, and we are of the opinion that he should not be permitted to recover against the defendant, who bought of the vendee in possession, for value, and without notice. Of course, if the vendor could not recover, his negligent agent, the plaintiff, can have no cause of action. We think this case falls within the principle declared in Railroad Co. v. Kitchin, 91 N. C. 39,—"that where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence, or by his negligent conduct made it possible for the loss to occur, must bear the loss. This doctrine is recognized in State v. Lewis, 73 N. C. 138; Vass v. Riddick, 89 N. C. 6; State v. Peck, 53 Me. 284; and in Hern v. Nichols, 1 Salk. 289." Had this been a conditional sale before the recent statute, an executory contract to sell, an ordinary bailment, or any other transaction which failed to pass the title, the innocent purchaser, however much he may have been misled by the possession and the apparent ownership of his vendor, would not be protected. Ballard v. Burgett, Langd. Cas. Sales, 730. The case of Millhiser v. Erdman, 103 N. C. 292, 9 S. E. Rep. 582, does not conflict with this view, as it was there held that by the terms of the agreement the title was not to pass until certain conditions were performed. Here the title passed, and a delivery having been made by the negligence of the vendor's agent, the plainest principles of justice forbid a recovery. As to the innocent purchaser the right of property and the right of possession are united, and his title is therefore complete. No error.

When Title Passes—Payment of the Price.

STATE v. JOHN O'NEIL.

58 Vermont 140. 1885.

ROYCE, C. J. The first and most important question presented by these cases, is whether or not the intoxicating liquors in question were (in the first two cases) in contemplation of law sold, or furnished, by the respondent in the County of Rutland and State of Vermont; or (in the last two cases) held and kept for the purpose of sale, furnishing, or distribution contrary to the statute, within said county and State. The answer depends upon whether the National Express Company, by which some of said liquors were delivered to the consignees thereof, and in whose possession the remainder were found and seized before delivery, was in law the agent of the vendors or of the vendees. If the purchase and sale of the liquors was fully completed in the State of New York, so that upon delivery of them to the express company for transportation the title vested in the consignees, as in the case of a completed and unconditional sale, then no offense against the laws of this State has been committed. If, on the other hand, the sale by its terms could only become complete so as to pass the title in the liquors to the consignees upon the doing of some act, or the fulfilling of some condition precedent after they had reached Rutland, then the rulings of the County Court upon the question of the offense were correct.

The liquors were ordered by residents of Vermont from dealers doing business in the State of New York, who selected from their stock such quantities and kinds of goods as they thought proper in compliance with the terms of the orders, put them up in packages, directed them to the consignees, and delivered them to the express company as a common carrier of goods for transportation, accompanied with a bill, or invoice, for collection. The shipment was in each instance, which it is necessary here to consider, "C. O. D."; and the cases show that the effect of the transaction was a direction by the shipper to the express company not to deliver the goods to the consignees except upon payment of the amount specified in the C. O. D. bills, together with the charges for the transportation of the packages and for

the return of the money paid. This direction was understood by the express company, which received the shipments coupled therewith.

Whether or not, and when, the legal title in property sold passes from the vendor to the vendee, is always a question of the intention of the parties, which is to be gathered from their acts, and all the facts and circumstances of the case taken together. In order that the title may pass, as was said by Morton, J., in Mason v. Thompson, 18 Pick. 305: "The owner must intend to part with his property, and the purchaser to become the immediate owner. Their two minds must meet on this point; and if anything remains to be done before either assents, it may be an inchoate contract, but it is not a perfect sale." The authorities seem to be uniform upon this point; and the acts of the parties are regarded as evidence by which the court or jury may ascertain and determine their intent. Benj. Sales, §§ 311, 319, note (*c*). When there is a condition precedent attached to the contract, the title in the property does not pass to the vendee until performance or waiver of the condition, even though there be an actual delivery of possession. Benj. Sales, § 320, note (*d*). The Vermont cases on the above points are referred to in Roberts's Digest, 610 et seq., and need not be specially reviewed here.

In the cases under consideration the vendors of the liquors shipped them in accordance with the terms of the orders received, and the mode of shipment was as above stated. They delivered the packages of liquors, properly addressed to the several persons ordering the same, to the express company, to be transported by that company and delivered by it to the consignees upon fulfillment by them of a specified condition precedent; namely, payment of the purchase-price and transportation charges, and not otherwise. Attached to the very body of the contract, and to the act of delivery to the carrier, was the condition of payment before delivery of possession to the consignee. With this condition unfulfilled and not waived, it would be impossible to say that a delivery to the carrier was intended by the consignor as a delivery to the consignee, or as a surrender of the legal title. The goods were intrusted to the carrier to transport to the place of destination named, there to present them for acceptance to the consignee, and if he accepted them

and paid the accompanying invoice and the transportation charges, to deliver them to him; otherwise, to notify the consignor and hold them subject to his order. It is difficult to see how a seller could more positively and unequivocally express his intention not to relinquish his right of property or possession in goods until payment of the purchase-price than by this method of shipment. We do not think the case is distinguishable in principle from that of a vendor who sends his clerk or agent to deliver the goods, or forwards them to, or makes them deliverable upon the order of, his agent, with instructions not to deliver them except on payment of the price, or performance of some other specified condition precedent by the vendee. The vendors made the express company their agent in the matter of the delivery of the goods, with instructions not to part with the possession of them except upon prior or contemporaneous receipt of the price. The contract of sale therefore remained inchoate or executory while the goods were in transit, or in the hands of the express company, and could only become executed and complete by their delivery to the consignee. There was a completed executory contract of sale in New York; but the completed sale was, or was to be, in this State. * * *

CHAPTER XII.

FRAUD AND ITS EFFECT.

Contract Voidable.

BARNARD v. CAMPBELL.

58 N. Y. 73. 1874.

This was a motion for reargument. The case is reported in 55 New York 456. The facts are briefly these:

On the 21st of August, 1863, one E. P. Jeffries contracted, through his broker, to sell defendants, who were merchants in New York, 1,800 bags of linseed. Defendants upon the same day, pursuant to the contract, mailed to Jeffries their notes for the amount of the purchase, which were received by him and immediately pledged as collateral for a loan. On the twenty-first Jeffries contracted to purchase of plaintiffs 1,800 bags, and on the twenty-fourth the latter, induced by the fraudulent representations of Jeffries, delivered to him an order upon a warehouse for 1,370 bags; these he received and shipped to defendants in part fulfillment of his contract with them. He took a bill of lading of the goods deliverable to defendants; this he forwarded to them on the twenty-fifth. On the arrival of the seed plaintiffs demanded it but defendants refused to deliver.

ALLEN, J. * * * Isolated expressions may be found in elementary treatises, as well as in judicial opinions, which give color to the claim of the defendants, to hold the property in dispute as against the plaintiffs, but these were not intended to, and do not, give the rule by which this and like cases are controlled. They are all proper, in the connection in which they are found and for the purposes for which they were used, and ought not to receive any other interpretation than such as was designed by the authors. It must be conceded that upon the delivery of the goods to Jeffries by the plaintiffs, under the circumstances, the property passed to Jeffries, and the fact that

the delivery was induced by fraud did not render the contract void. It was merely voidable at the instance of the plaintiffs, who might elect to disaffirm the contract and reclaim the property. That is, the contract of sale was defeasible at the election of the plaintiffs, the vendors, if the election was seasonably made, and the goods reclaimed in proper time, after the discovery of the fraud. The plaintiffs could lose the right by delay as against the wrong-doer, if, in consequence of such delay, his position should be changed, and they would have lost it absolutely if during the interval between the delivery of the goods, the vesting of this defeasible title in the purchaser, Jeffries, and the disaffirmance of the sale by the plaintiffs, the goods had been sold to an innocent third party for a valuable consideration. The superior equity of a purchaser of property from one who has acquired a title defeasible at the election of the former owner and vendor, by reason of fraud, to that of such owner seeking to reclaim his property, is based upon the fact that acting upon the evidence of title which the owner has permitted the wrong-doer to assume and possess, he has been induced to part with value, and will be the loser because of the credit given to the apparent ownership if he is compelled to surrender the property. The mere possession by the party claiming to hold will not sustain his claim, but the circumstances under, and consideration upon which he has acquired the possession are also material. Were it otherwise, an assignee for the benefit of creditors, or one who should take as collateral security for the payment of a precedent debt, would hold as against the original owner, which is not claimed and is contrary to the whole current of authority. Several things must concur to bar the claim of the defrauded vendor. 1. He must have parted with possession of his property with intent to pass the title to the wrong-doer, thus giving him the apparent right of disposal. If property is taken feloniously or without the consent of the owner, the taker can make no title to it, even to an innocent purchaser for value. 2. A third party must have acquired title from the wrong-doer without notice of the defects in his title or knowledge of circumstances to put him to an inquiry as to the source of his title. And, 3. Such third party must have parted with value upon the faith of the apparent title of the wrong-doer, and his right to dispose of the property. If any of these elements are want-

ing, the vendor seasonably pursuing his legal right may have his property. That this formula very closely resembles that by which an estoppel in pais is defined and limited is true, and this must necessarily be so, so long as the rights based upon each have the same equitable foundation. The defendants parted with no value, incurred no liability, and in no respect changed their situation in the interval between the delivery of the merchandise by the plaintiffs to Jeffries, and their disaffirmance of the contract, and reclaiming the goods. In other words, they did nothing in consequence of such delivery to Jeffries or based upon his title and possession, and are in precisely the same situation as if the goods had never left the possession of the plaintiffs. They parted with their notes and incurred obligations upon the faith of the promise and agreement of Jeffries and upon his credit alone.

It is possible that the claim of the defendants to hold as bona fide purchasers for value is sustained by Fenby v. Pritchard, 2 Sandf. 151, but this case is so at war with principles recognized as well settled by this court in analogous cases, that it cannot be regarded as well decided. The cases cited from Maine and Illinois (Lee v. Kimball, 45 Me. 172; Butters v. Haughwout, 42 Ill. 18), treat the case as analogous to a transfer of negotiable paper, and hold that a precedent debt is a valuable consideration for the transfer, and gives the transferee a good title as against the former owner. This is in direct conflict with the uniform decisions in this State, from Bay v. Coddington, 5 J. Ch. 54; affirmed, 20 J. R. 637, to Weaver v. Barden, 49 N. Y. 286; affirmed, Turner v. Treadway, 53 id. 650. One other case from Maine cited by the counsel for the appellants (Titcomb v. Wood, 38 Me. 561), recognizes the necessity of a valuable consideration, as that term is understood and used by the courts of this State, as necessary to give the purchaser of property from a fraudulent vendor a superior equity and title to that of the former owner, and find such a consideration in the transfer of property before then stolen from the defendant. The court say: "Here the defendant being the owner of stolen property, with his right and title unimpaired by the felony, transferred it to McClure for the property in question, in part payment, at least. This constituted a valuable consideration for his purchase, given at the time. Thus, it appears that he was a purchaser of the

gold watch, bona fide, for a valuable consideration, and without notice of the fraud by which his vendor acquired it. This gives him a superior equity and a better right, and enables him to hold the property against the defrauded vendor." * * *

Judge Bosworth, in Caldwell v. Bartlett, 3 Duer 341, and Keyser v. Harbeck, id. 372, recognizes the doctrine that the advance must be made or consideration parted with upon the faith of the title of one in actual possession of the property, or the written evidence of title, to give an indefeasible title as against the true owner. All the authorities are direct and to the effect that no one but a bona fide purchaser, or pledgee for value—that is, one who gives value for or makes advances upon goods obtained from the owner by fraud or fraudulent representation—and that he who has paid value, or made advances, or incurred responsibilities upon the credit of them, can alone claim to hold them as against such owner. Root v. French, 13 Wend. 573; Mowrey v. Walsh, 8 Cow. 238; Hoffman v. Noble, 6 Met. 68. There is no good reason or equity in placing the burden of a fraudulent sale upon a bona fide vendor rather than upon a bona fide purchaser from the fraudulent vendee, unless the purchaser has parted with his money, or some value, upon the credit of possession or some evidence of title in the vendee, received from the original owner, and by means of which he has induced the purchaser to treat with him as owner. * * *

Motion denied.

Contract Void.

RODLIFF v. DALLINGER.

141 Mass. 1, 4 N. E. 805. 1885–6.

[Replevin for twenty bags of California wool. The plaintiffs were wool dealers and on November 15, 1882, delivered the wool in controversy to one Henry Clementson, a wool dealer and broker. The defendant was a public warehouseman who received the wool in question on storage from Clementson and issued a warehouse receipt for the same. Clementson then applied to the Massachusetts Loan and Trust Company for a loan on the security of this wool, which they made, taking the warehouse

receipt of the defendant. The company being the real party in interest, defended this action.

Prior to November 15, Clementson had on one occasion purchased wool from the plaintiffs on credit, once for himself, and afterwards acting as broker for the firm of Pomeroy & Sons. On November 14, Clementson offered to buy a large quantity of wool from the plaintiffs, representing that he was buying it for some manufacturer from whom he had an offer. When the plaintiffs asked Clementson who the parties were, he would not tell them, but said they were as good as Pomeroy & Sons. Upon these representations plaintiffs let him have the wool.]

It was an undisputed fact that Clementson had not any such offer, and did not act for any such person as the plaintiffs testified that he represented at the time of obtaining the wool.

The judge instructed the jury that there were three possible views of the transaction: (1) That they might find it was an ordinary sale to Clementson; or (2) that it was not a sale to Clementson, but was a delivery to Clementson as a broker, with a view to his selling it to some customer, whom he expected afterward to negotiate with, and to consummate a sale with him; and, if they found this, then there was a special provision of the statute which protects persons dealing in good faith with a broker having property in that way, so far as they make advances or loans upon property in pledge, in good faith, to persons who have custody of property as brokers, with authority to sell or dispose of it; or (3) that it was not a sale to Clementson, or a delivery to him as broker with authority to sell, but that it was a delivery to Clementson, upon his representation that he came from a purchaser, representing him, with an offer for it,—a purchaser whose name he did not disclose,—and that these goods were delivered to him as the agent of that purchaser, as a sale to that purchaser; and if this was the fact, that the plaintiffs were entitled to the property, notwithstanding it was subsequently pledged to the Massachusetts Loan and Trust Company.

The judge further instructed the jury, upon the third view, "that, if this was a transfer upon a false representation made by Clementson,—a representation that he came with an offer from a third person whose name he did not wish to disclose,—and the goods were delivered to Clementson as a sale to him as the agent of this third person whose offer he was bearing, with

the view that the property should pass at the time to that third person and thus constitute a sale to such person, from whom payment was to be made subsequently, and the payment to be brought back by Clementson as the agent of that third person, Clementson had no right afterward to deal with that property at all; that he got it into his possession by fraud, and he got it into his possession without any authority to make any subsequent sale, or to do anything with it; and that it was wrongly in his possession from the start, and any person who saw fit to advance money upon it or to buy it, however honestly, and in perfect good faith, would be the loser, and the plaintiffs could pursue the property and get it wherever they could find it, whenever the fraud practiced upon them should come to their knowledge."

The jury returned a verdict for the plaintiffs; and the defendant alleged exceptions.

HOLMES, J. The plaintiffs' evidence warranted the conclusion that they refused to sell to Clementson, the broker, but delivered the wool to him on the understanding that it was sold to an undisclosed manufacturer in good credit with the plaintiffs. This evidence was not objected to, and was admissible, notwithstanding the fact that the sale was entered on the plaintiffs' books as a sale to Clementson, and that a bill was made to him. Commonwealth v. Jeffries, 7 Allen 548, 564. It was admitted that Clementson, in fact, was not acting for such an undisclosed principal; and it follows that, if the plaintiffs' evidence was believed, there was no sale. There could not be one to this supposed principal, because there was no such person, and there was not one to Clementson, because none purported to be made to him, but, on the contrary, such a sale was expressly refused and excluded. Edmunds v. Merchants' Despatch Transportation Co., 135 Mass. 283.

It was suggested that this case differed from the one cited, because there the principal was disclosed, whereas here he was not, and that credit could not be supposed to have been given to an unknown person. We have nothing to say as to the weight which this argument ought to have with a jury, beyond observing that the plaintiffs had reason in Clementson's representations for giving credit to the supposed manufacturer. But there is no rule of law that makes it impossible to contract with or sell

to an unknown but existing party. And if the jury find that such a sale was the only one that purported to be made, the fact that it failed does not turn it into a sale to the party conducting the transaction. Schmaltz v. Avery, 16 Q. B. 655, only decides that a man's describing himself in a charter-party as "agent of the freighter" is not sufficient to preclude him from alleging that he is the freighter. It does not hint that the agent could not be excluded by express terms, or by the description of the principal, although insufficient to identify the individual dealt with, as happened here; still less, that in favor of third persons the agent would be presumed without evidence to be the undisclosed principal, although expressly excluded.

The invalidity of the transaction in the case at bar does not depend upon fraud, but upon the fact that one of the supposed parties is wanting, it does not matter how. Fraud only becomes important, as such, when a sale or contract is complete in its formal elements, and therefore valid unless repudiated, but the right is claimed to rescind it. It goes to the motives for making the contract, not to its existence; as when a vendee expressly or impliedly represents that he is solvent and intends to pay for goods, when in fact he is insolvent, and has no reasonable expectation of paying for them; or, being identified by the senses and dealt with as the person so identified, says that he is A, when in fact he is B. But when one of the formal constituents of a legal transaction is wanting, there is no question of rescission; the transaction is void ab initio, and fraud does not impart to it, against the will of the defrauded party, a validity that it would not have if the want were due to innocent mistake.

The sale being void, and not merely voidable, or, in simpler words, there having been no sale, the delivery to Clementson gave him no power to convey a good title to a bona fide purchaser. He had not even a defective title, and his mere possession did not enable him to pledge or mortgage. The considerations in favor of protecting bona fide dealers with persons in possession, in cases like the present, were much urged in Thacher v. Moors, 134 Mass. 156, but did not prevail. Much less can they be allowed to prevail against a legal title, without the intervention of statute.

Exceptions overruled.

CHAPTER XIII.

SELLER'S REMEDIES.

Goods to be Made to Order.

BEMENT v. SMITH.

15 Wendell 493 (N. Y.). 1836.

This was an action of assumpsit, tried at the Seneca circuit in November, 1834, before the Hon. Daniel Moseley, one of the circuit judges.

In March, 1834, the defendant employed the plaintiff, a carriage-maker, to build a sulky for him, to be worth ten dollars more than a sulky made for a Mr. Putnam; for which he promised to pay $80, part in a note against one Joseph Bement, a brother of the plaintiff, for the sum of ten or eleven dollars, and the residue in his own note, at six or twelve months, or in the notes of other persons as good as his own. In June, 1834, the plaintiff took the sulky to the residence of the defendant, and told him that he delivered it to him, and demanded payment, in pursuance of the terms of the contract. The defendant denied having agreed to receive the carriage. Whereupon the plaintiff told him he would leave it with a Mr. De Wolf, residing in the neighborhood; which he accordingly did, and in July, 1834, commenced this suit. It was proved that the value of the sulky was $80, and that it was worth $10 more than Putnam's. The declaration contained three special counts, substantially alike, setting forth the contract, alleging performance on the part of the plaintiff, by a delivery of the sulky, and stating a refusal to perform, on the part of the defendant. The declaration also contained a general count, for work and labor, and goods sold. The judge, after denying a motion for a nonsuit, made on the assumed grounds of variance between the declaration and proof, charged the jury that the tender of the carriage was substantially a fulfillment of the contract on the part of the plaintiff,

and that he was entitled to sustain his action for the price agreed upon between the parties. The defendant's counsel requested the judge to charge the jury that the measure of damages was not the value of the sulky, but only the expense of taking it to the residence of the defendant, delay, loss of sale, &c. The judge declined so to charge, and reiterated the instruction that the value of the article was the measure of damages. The jury found for the plaintiff, with $83.26 damages. The defendant moved for a new trial. The cause was submitted on written arguments.

SAVAGE, C. J. The defendant presents no defense upon the merits. His defense is entirely technical, and raises two questions: 1. Whether the tender of the sulky was equivalent to a delivery, and sustained the averment in the declaration that the sulky was delivered; and 2. Whether the rule of damages should be the value of the sulky, or the particular damages to be proved, resulting from the breach of the contract. There is no question raised here upon the Statute of Frauds. The contract is therefore admitted to be a valid one; and relating to something not in solido at the time of the contract, there is no question of its validity.

The plaintiff agreed to make and deliver the article in question at a particular time and place, and the defendant agreed to pay for it, on delivery, in a particular manner. The plaintiff made, and as far as was in his power, delivered the sulky. He offered it to the defendant at the place and within the time agreed upon. It was not the plaintiff's fault that the delivery was not complete, that was the fault of the defendant. There are many cases in which an offer to perform an executory contract is tantamount to a performance. This, I apprehend, is one of them. The case of Towers v. Osborne, Strange 506, was like this. The question here presented was not raised, but the defendant there sought to screen himself under the Statute of Frauds. The defendant bespoke a chariot, and when it was made, refused to take it; so far the cases are parallel. In an action for the value, it was objected that the contract was not binding, there being no note in writing, nor earnest, nor delivery. The objection was overruled. In that case the action was brought for the value, not for damages for the breach of contract. This case is

like it in that particular; this action is brought for the value, that is, for the price agreed on; and it is shown that the sulky was of that value. The case of Crookshank v. Burrell, 18 Johns. R. 58, was an action in which the plaintiff declared against the defendant on a contract whereby the plaintiff was to make the woodwork of a wagon, for which the defendant was to pay in lambs. The defendant was to come for the wagon. The question was upon the Statute of Frauds. Spencer, C. J., states what had been held in some of the English cases, 4 Burr. 2101, and 7 T. R. 14, that a distinction existed between a contract to sell goods then in existence, and an agreement for a thing not yet made. The latter is not a contract for the sale and purchase of goods, but a contract for work and labor merely. The case of Crookshank v. Burrell is much like this, with this exception: there the purchaser was to send for the wagon; here the manufacturer was to take it to him. There it was held that the manufacturer was entitled to recover, on proving that he had made the wagon according to the contract: here it is proved that the sulky was made, and taken to the place of delivery according to contract. The merits of the two cases are the same. It seems to be conceded that an averment of a tender of the sulky by the plaintiff, and a refusal of the defendant to receive it, would have been sufficient; and if so, it seems rather technical to turn the plaintiff out of court, when he has proved all that would have been required of him to sustain his action. The plaintiff, in his special counts, does not declare for the sale and delivery, but upon the special contract; and herein this case is distinguishable from several cases cited on the part of the defendant, and shows that it was not necessary to have declared for goods bargained and sold. It seems to me, therefore, that the judge was right in refusing the nonsuit, and in holding that the evidence showed substantially a fulfillment of the contract. The variance as to the amount of Joseph Bement's note, I think, is immaterial; but if otherwise, it may be amended. The alleged variance as to the price of the sulky is not sustained by the facts of the case.

The only remaining question, therefore, is as to the damages which the plaintiff was entitled to recover. It is true that the plaintiff does not recover directly as for goods sold; but in the case of Towers v. Osborne the plaintiff recovered the value of

the chariot, and in Crookshank v. Burrell the recovery was for the value of the wagon. The amount of damages which ought to be recovered was not the question before the court in either of those cases; but if the value of the article was not the true measure, we may infer that the point would have been raised. Upon principle, I may ask, what should be the rule? A mechanic makes an article to order, and the customer refuses to receive it: is it not right and just that the mechanic should be paid the price agreed upon, and the customer left to dispose of the article as he may? A contrary rule might be found a great embarrassment to trade. The mechanic or merchant, upon a valid contract of sale, may, after refusal to receive, sell the article to another and sue for the difference between the contract price and the actual sale. Sands and Crump v. Taylor and Lovett, 5 Johns. R. 395, 410, 411; 1 Salkeld, 113; 6 Modern, 162. In the first of these cases, the plaintiffs sold the defendants a cargo of wheat. The defendants received part, but refused to receive the remainder. The plaintiffs tendered the remainder, and gave notice that unless it was received and paid for, it would be sold at auction, and the defendants held responsible for any deficiency in the amount of sales. It was held, upon this part of the case, that the subsequent sale of the residue was not a waiver of the contract, the vendor being at liberty to dispose of it bona fide, in consequence of the refusal of the purchaser to accept the wheat. This case shows that where there has been a valid contract of sale, the vendor is entitled to the full price, whether the vendee receive the goods or not. I cannot see why the same principle is not applicable in this case. Here was a valid contract to make and deliver the sulky. The plaintiff performed the contract on his part. The defendant refused to receive the sulky. The plaintiff might, upon notice, have sold the sulky at auction, and if it sold for less than $80, the defendant must have paid the balance. The reason given by Kent, C. J., 5 Johns. R. 411, is, that it would be unreasonable to oblige him to let the article perish on his hands, and run the risk of the insolvency of the buyer. But if after tender or notice, whichever may be necessary, the vendor chooses to run the risk and permit the article to perish, or, as in this case, if he deposit it with a third person for the use of the vendee, he certainly must have a right to do so, and prosecute for the whole price. Suppose a tailor

makes a garment, or a shoemaker a pair of shoes, to order, and performs his part of the contract, is he not entitled to the price of the article furnished? I think he is, and that the plaintiff in this case was entitled to his verdict.

The question upon the action being prematurely brought before the expiration of the credit which was to have been given, cannot properly arise in this case, as the plaintiff recovers upon the special contract, and not upon a count for goods sold and delivered. New trial denied.

CHAPTER XV.

BUYER'S RIGHT OF INSPECTION.

When and Where Inspection Should be Made.

PIERSON v. CROOKS.

115 N. Y. 539, 22 N. E. 349. 1889.

ANDREWS, J. The contract was between the plaintiffs, importers and dealers in iron in the city of New York, and the defendants, engaged at Liverpool, England, in the business of buying and selling iron manufactured by other persons, and having an agency in the city of New York. * * *

By the contract the defendants were to deliver the iron "free on board" at Liverpool, and the plaintiffs were to pay for it by bills of exchange at 60 days on delivery to them of the shipping documents in New York. * * *

It is conceded on both sides that the contract was executory, and not executed, and that the rights of the parties are governed by the rules which apply to a contract to sell and deliver in the future a commodity to be procured by the vendors, as distinguished from a sale in præsenti of specific, identified, and existing merchandise.

The main controversy relates to the claim of the plaintiffs to recover back duties and expenses, etc., paid by them in New York on the hoops shipped by the defendants at Liverpool, amounting to $2,501.69, and the further sum of $3,229.78 paid on the contract for the purchase of the hoops. The claim is put on the ground that the quality of the hoops did not correspond with the contract, and that they were greatly inferior and unmerchantable, and were rejected for that reason by the plaintiffs. The fact that the hoops were of a greatly inferior quality is not now controverted. * * *

The defendants, while admitting the inferior quality of the iron, resist the recovery had by the plaintiffs on the grounds:

First, that they delivered the iron "on board" steamers at Liverpool, according to their contract, and that the plaintiffs were bound then and there to inspect the iron and ascertain its quality, and reject it if it was not according to contract, but, not having done so, this was in law an acceptance at Liverpool which precluded them from subsequently questioning the quality or rejecting the iron; second, that, if the right of inspection and rejection might have been exercised after the iron reached New York, the plaintiffs did not act with sufficient promptness, and lost the right by delay. * * *

There is no dispute as to the rule of law touching the rights of parties under an executory contract for the future sale and delivery of goods of a specified quality, in the absence of express warranty. The quality is a part of the description of the thing agreed to be sold, and the vendor is bound to furnish articles corresponding with the description. * * *

He can do nothing inconsistent with the right of rejection, or do what is only consistent with acceptance and ownership, without precluding himself. The mere use of an article on trial may, in some cases, be contemplated by the parties as a means by which the vendee is to ascertain whether it corresponds in quality with the article agreed to be furnished. In such cases, mere use is not inconsistent with a subsisting right to reject for cause, and will not constitute an acceptance. The general rule is stated in Benjamin on Sales. In section 701 the author says: "The buyer is entitled, before acceptance, to a fair opportunity of inspecting the goods, so as to see if they correspond with the contract;" and in section 706: "When goods are sent to a buyer in performance of the vendor's contract, the buyer is not precluded from objecting to them by merely receiving them; for receipt is one thing, and acceptance another. But receipt will become acceptance if the right of rejection is not exercised within a reasonable time, or if any act be done by the buyer which he would have no right to do unless he were the owner of the goods." * * *

The defendants insist that, in the absence of express words, the law ascertains and fixes the intention that examination should be made at the place where the defendants were to deliver the iron, to-wit, at Liverpool. We are, however, of opinion that where goods are ordered of a specific quality, which the vendor

undertakes to deliver to a carrier, to be forwarded to the vendee at a distant place, to be paid for on arrival, the right of inspection, in the absence of any specific provision in the contract, continues until the goods are received and accepted at their ultimate destination; and that the carrier is not the agent of the vendee to accept the goods as corresponding with the contract, although he may be his agent to receive and transport them. The defendants undertook to deliver iron of a specific quality on board steamers at Liverpool, to be sent to the purchasers at New York. This contract was not performed by delivering iron of inferior quality. They knew, or were bound to know, that the iron delivered was defective. They selected and purchased the iron; and it was within their power, and it was their duty, to supply iron of the proper grade. If they sent forward iron of inferior grade, they justly should bear the consequences, and sustain any loss entailed by the non-performance of their contract, unless they guarded themselves by imposing upon the plaintiffs the duty of acceptance or rejection at the port of shipment. It is said that, on the delivery of the iron on shipboard at Liverpool, the title vested in the plaintiffs, and that the vesting of the title in the vendees implies an acceptance, and is inconsistent with the alleged right of inspection and rejection on its arrival in New York. There can be no doubt that, on delivery to the carrier of iron corresponding with the contract, the title would immediately vest in the purchasers, and the iron would thereafter be at their risk; nor is there any doubt of the general rule that delivery of goods corresponding with the contract is a condition precedent to the vesting of the title in the vendee. Reed v. Randall, supra. But assuming that the title to the iron, for some purposes, vested in the plaintiffs on delivery to the steamers, it was, as between the vendors and vendees, a conditional title, subject to the right of inspection and rejection for inferior quality on arrival at New York. The circumstances strongly confirm the view that the parties did not contemplate that the right of inspection should be exercised at Liverpool. The contract was made in New York, and the plaintiffs had no agent in Liverpool. The defendants shipped the iron on steamers selected by themselves. They gave the plaintiffs no notice in advance of the times of shipment, or by what steamers the shipments would be made, or at least no notice in time to enable the plaintiffs to

exercise the right of inspection at Liverpool. The plaintiffs, after arrival of the first shipment by the "Germanic," rejected the hoops on board for defect in quality; and the defendants' agent in New York, while not assenting to the fact that they were inferior, said they would consider and examine into it, but made no claim that the objection came too late.

The ordering of goods of a specific quality by a distant purchaser of a manufacturer or dealer, with directions to ship them by a carrier, is one of the most frequent commercial transactions. It would be a most embarrassing and inconvenient rule—more injurious even to the dealer or manufacturer than to purchasers—if delivery to the carrier was held to conclude the party giving the order from rejecting the goods on arrival, if found not to be of the quality ordered. * * * An examination by carriers of the quality of the goods would be in most cases impracticable. The first ground upon which the defendants sought to defeat the action cannot, we think, be supported; and we are of opinion that the plaintiffs had the right of inspection and rejection for defect in quality after the iron arrived in New York.

The objection that the plaintiffs waived the right to reject the iron for defective quality by their delay in inspecting and rejecting it after it reached New York was urged on the trial; and the referee found, although with "some degree of hesitation," that under all the circumstances there was no unreasonable delay in the examination by the plaintiffs after its arrival. * * * It was said by Lord Ellenborough in Fisher v. Samuda, 1 Camp. 190, that "it was the duty of a purchaser of any commodity, immediately on discovering that it was not according to order, and unfit for the purpose intended, to return it to his vendor, or give him notice to take it back." Similar language was used by the same judge in Hopkins v. Appleby, 1 Starkie 477; and in Sprague v. Blake, and Reed v. Randall, supra, the doctrine stated by Lord Ellenborough was quoted with approval. Indeed, it stands upon the most obvious justice and equity that the seller should be apprised promptly if there is any objection, and the vendee intends to reject the goods, so that he may retake possession or resell the goods, and save himself as far as practicable from loss. But the vendee has a reasonable time for examination and to give notice; and what is a reasonable time

is usually a question of fact, and not of law, to be determined by the jury upon all the circumstances, including as well the situation and liability of injury to the vendor from delay as the convenience and necessities of the vendee. In Fisher v. Samuda there was an interval of six months between the discovery of the defect and notice to the vendor. In Hopkins v. Appleby the vendee used the article purchased, after discovering the defect, until it was wholly consumed, and then for the first time notified the vendor of the defective quality. In Reed v. Randall the tobacco was delivered to the vendee in April, and the first notice to the vendor of any defect was in September of the next year.

The delay in the examination of the hoops which came by the "Germanic" for five or six days after they were unloaded, and of ten days in the case of the "Arizona," and a less number in the case of the "Chester," and the subsequent delay until the 8th of May to give notice of the rejection of the hoops which came by the two last-named vessels, was not so great that the court can say, as matter of law, that it was unreasonable; and we are concluded by the finding of the referee from reëxamining the question of fact. The authorities are uniform upon the point that the question of reasonable time, in such cases, is generally one of fact, and not of law. Doane v. Dunham, 79 Ill. 131; Boothby v. Scales, 27 Wis. 626; Hickman v. Shimp, 109 Pa. St. 16; Stone v. Browning, 68 N. Y. 604; Benj. Sales. 904.

We think the judgment is right, and it should therefore be affirmed.

Use or Test of Goods—What Constitutes Acceptance.

CREAM CITY GLASS CO. v. FRIEDLANDER.

84 Wis. 53, 54 N. W. 28. 1893.

[Plaintiff ordered from the defendant one hundred and fifty tons of carbonated soda ash for use in its business as glass manufacturers, paying the contract price together with the freight and duty. When the goods were unloaded the plaintiff dicovered that they had been damaged by water, and notified the defendant that the goods were unfit for his use and that he rescinded the contract, offering to return the goods, and demanded repayment

of the price. Defendant refused to take back the property, and the plaintiff then used about one thousand five hundred pounds, which was a reasonable amount for this purpose, in making a practical test of the materials, which test showed that glass could not be made with it. The lower court allowed plaintiff to recover the purchase price and the defendant appealed.]

WINSLOW, J. * * * We shall consider but one other question upon this appeal, and that is the question of the effect upon the rights of the parties of the use of six tierces of the soda ash by the plaintiff in January or February following the sale, for the purpose of testing its fitness for the manufacture of glass. Assuming that the evidence is sufficient to establish an implied warranty that the soda ash in question was of a quality reasonably fit to be used in the manufacture of glass, the question is, could the plaintiff, after having decided that the material was wholly unfit, and notified the defendant of its decision and its rejection of the material, proceed to use three-quarters of a ton of the material in making a practical test, and still insist on its right of rejection? It seems clear that the plaintiff was entitled to a reasonable time after actual receipt of the material to exercise the right of rejection in case the goods did not conform to the contract. Benj. Sales (6th Ed.), § 703. If this fact could only be ascertained by a practical test, the plaintiff also had the right, within such reasonable time, to make such practical test, using only so much of the material as was reasonably necessary for the purpose, without thereby losing the right of rejection. Benj. Sales (6th Ed.), § 896; Philadelphia Whiting Co. v. Detroit White Lead Works, 58 Mich. 29, 24 N. W. Rep. 881. But this test is plainly for the purpose only of enabling the purchaser to decide whether the material conforms to the contract. If the fact can be determined by inspection alone, the test is not necessary, and the use of the material, therefore, clearly unjustifiable. Now, in this case the plaintiff's officers determined at once, and upon inspection alone, that the material was unfit for their purposes, and so notified the defendant, and rejected the entire lot. They did not claim to need any test. They took their position definitely. After that act they could not deal with the property in any way inconsistent with the rejection, if they proposed to insist upon their right to reject.

Churchill v. Price, 44 Wis. 540. They must do no act which they would have no right to do unless they were owners of the goods. Benj. Sales (6th Ed.), § 703. Under these rules it is evident the plaintiff had no right to use up a quantity of the material several weeks after the rejection. By the rejection it became defendant's property, if such rejection was rightful. Plaintiff had no right to use any part of it. It is claimed that the use was simply for the purpose of providing evidence of unfitness for the purposes of the trial of this case; but one has no right to use his opponent's property for the purpose of making evidence. The act was an unmistakable act of ownership, and entirely inconsistent with the claim that the material had been rejected, and was owned by defendant. It follows that the judgment must be reversed. Judgment reversed, and cause remanded for a new trial.

CHAPTER XVI.

IMPLIED WARRANTIES.

Warranty of Title.

GOULD v. BOURGEOIS.

51 N. J. L. 361. 1889.

DUPUE, J. This suit was upon a promissory note made by the defendant. The defense was the want or failure of consideration. The city council of Holy Beach City proposed to build a breakwater. The defendant was an applicant for a contract to do the work, and prepared and sent to the city council an agreement with the city to that effect. Members of the city council sent word to the defendant that the city had already entered into a contract for the building of the breakwater with Gould & Downs, that these parties could not fulfill their contract, and that, if the defendant would make a satisfactory arrangement with Gould & Downs, the city would give him the contract. The parties thereupon entered into negotiation, the conclusion of which was a contract in writing and under seal, whereby Gould & Downs, for the consideration of a note for $375 and $500 in city bonds, assigned to the defendant "all our right, title, and interest in a certain contract entered into by the authorities of Holy Beach City and ourselves to build a certain breakwater ordered built by a resolution passed April 14, 1887."

Subsequently, the city council, having obtained the opinion of counsel that the city had no power to build the breakwater, refused to ratify the arrangement of the defendant with Gould & Downs, and abandoned the project of constructing the work. The note sued on was given in compliance with the terms of this assignment. There was no proof of an express warranty by Gould & Downs of the validity of their contract, nor any evidence from which fraud, either in representation or concealment on their part, could be inferred. The power of the city to make

the contract was not mooted until after these parties had concluded their arrangement and the assignment had been made; and, if the contract was invalid, its invalidity arose from the city charter,—a public act equally within the knowledge of both parties.

The defendant's contention was that, inasmuch as there was a sale of the contract, a warranty that the contract was a valid contract was implied, and that, the contract being ultra vires on the part of the city, and void, the consideration entirely failed. If the proposition on which the defense was rested be sound in law, the defense was appropriate in this suit. The doctrine of implied warranty of title in the sale of goods applies as well to the sale of a chose in action, and extends not merely to the paper on which the chose in action is written, but embraces also the validity of the right purported to be transferred. Wood v. Sheldon, 42 N. J. L. 421. Nor is there anything in the nature of the alleged infirmity of the contract that would bar the defense. In the ordinary case of a suit on a breach of warranty of title, the validity of the vendor's title against the adverse claimant is triable, if the purchaser has in fact lost title, although the transactions which determine the vendor's title are res inter alios acta. * * *

The validity of the defense offered and overruled depends upon the fundamental proposition whether, under the circumstances of this sale, a warranty of title is implied in law. The theory on which a warranty of title is implied upon the sale of personal property is that the act of selling is an affirmation of title. The earlier English cases, of which Medina v. Stoughton, 1 Salk. 210, 1 Ld. Raym. 593, is a type, adopted a distinction between a sale by a vendor who was in possession and a sale where the chattel was in the possession of a third person; annexing a warranty of title to the former, and excluding it in the latter. * * * Later decisions have placed the whole subject of implied warranty of title on a more reasonable basis. Mr. Benjamin, in his Treatise on Sales, after a full examination and discussion of the late English cases, states the rule in force in England at this time in the following terms: "A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor

did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold." 2 Benj. Sales (Corbin's Ed.), §§ 945-961. In this country the distinction between sales where the vendor is in possession and where he is out of possession, with respect to implied warranty of title, has been generally recognized; but the tendency of later decisions is against the recognition of such a distinction, and favorable to the modern English rule. Id. § 962, note 21. * * * There is a line of English cases holding that, where the facts and circumstances show that the purpose of the sale, as it must have been understood by the parties at the time, was not to convey an absolute and indefeasible title, but only to transfer the title or interest of the vendor, no warranty of title will be implied. In this proposition the fact that the vendor is in or out of possession is only a circumstance of more or less weight, according to the nature and circumstances of the particular transaction.

* * * * * * * * * * *

Chief Justice Erle, in his opinion in Eichholz v. Bannister, describes Morley v. Attenborough, Chapman v. Speller, and Hall v. Conder, as belonging to the class of cases where the conduct of the seller expresses, at the time of the contract, that he merely contracts to sell such title as he himself has in the thing. The opinion is valuable, in that, while it rescues the common-law rule of implied warranty of title from the assaults of distinguished judges who held that caveat emptor applied to sales in all cases, and that in the absence of express warranty or fraud the purchaser was remediless, it also placed the rule under the just limitation that it should not apply where the circumstances showed that the sale purported to be only a transfer of the vendor's title. Expressions such as "if a man sells goods as his own, and the title is deficient, he is liable to make good the loss" (2 Bl. Comm. 451), or "if he sells as his own, and not as the agent of another, and for a fair price, he is understood to warrant the title" (2 Kent Comm. 478),—as a statement of the principle on which the doctrine of implied warranty of title rests, is not inconsistent with the principle adopted by Chief Justice Erle.

The limitation above mentioned upon the doctrine that the act of selling is an affirmation of title has been adopted in this State. In Bogert v. Chrystie, 24 N. J. L. 57-60, this court held that

the general rule that the vendor of goods having possession, and selling them as his own, is bound in law to warrant the title to the vendee, did not apply where the vendor sells with notice of an outstanding interest in a third party, and subject to that interest. In Hoagland v. Hall, 38 N. J. L. 351, the vendor agreed in writing to assign a lease he held upon certain premises, and to sell and transfer goods and chattels mentioned in a schedule. The premises were a licensed inn and tavern, and in the schedule of the articles sold were enumerated "the licenses of the house." The law under which the license was granted prohibited the transfer of a license, and in the purchaser's hands it would be void and valueless. The court held that that circumstance did not justify the purchaser in withdrawing from his contract; that there was no warranty by the vendor that the license, when assigned, would be of any value to the purchaser; and that the latter, having obtained by the assignment what he had bargained for, could not annul his contract unless he showed fraud or misrepresentation with respect to the subject-matter of the contract.

In National Bank v. Massachusetts Loan & Trust Co., 123 Mass. 330, the defendant had a contract with B., pledging to him certain tobacco, in which it was recited that the tobacco was B.'s own property, and free from all incumbrances, and made an assignment to the plaintiff "of all his right, title, and interest in and under the contract, with all the property therein mentioned." The tobacco was then in the defendant's possession, and was delivered by him to the plaintiff. Afterwards a third person demanded and recovered of the plaintiff part of the tobacco as his property, which had been pledged to the defendant without right. The plaintiff then sued the defendant on an alleged implied warranty of title. The court ruled adversely to the plaintiff's claim. In the opinion the court said that the written assignment did not purport to be a sale of the goods, but of all the defendant's right under the contract, and its obvious purpose was to substitute the plaintiff in the place of the original pledgee, and that the fact that at the time of the transfer to the plaintiff the goods were in the actual possession of the defendant did not vary the case.

In the case in hand the circumstances connected with the assignment, independent of the words "all our right, title, and

interest," etc., contained in it, preclude the implication of a warranty of the validity of the contract. Taken in connection with the words of the assignment, the intention of the parties is free from doubt.

The transaction was the purchase of Gould & Downs' interest to consummate an arrangement whereby those parties were to be got rid of, that the city might give the defendant a contract. The defendant obtained by the assignment all he bargained for.

The defense was properly overruled, and the rule to show cause should be discharged.

Warranty of Merchantability.

WILSON v. LAWRENCE.

139 Mass. 318, 1 N. E. 278. 1885.

DEVENS, J. The argument of the case at bar and the rulings requested by the defendants at the trial in the court below, to the refusal to give which exception is taken, assume many facts to have been shown and much evidence to have been given which do not appear in the bill of exceptions. No ground of exception is afforded by the refusal to give instructions requested, unless it appear that they were required by the circumstances under which the case was presented to the jury, and were pertinent to the issue. Chandler v. Jamaica Pond Aq. Corp., 125 Mass. 544. The plaintiff was a dealer in pianos, and the defendants were engaged in their manufacture. The first request assumes that the article, for breach of a contract of warranty in the sale of which the action was brought, was manufactured and sold for a particular purpose, when all that appears in the bill is that the defendants knew that the plaintiff was a dealer in pianos. The second and third assume that no opportunity was offered the plaintiff of inspecting the piano; that he did not do so; and that he relied upon the skill and judgment of the seller. The fourth assumes that the defendants undertook to furnish a first-class piano,—one capable of being sold as such; but the bill does not set forth facts or evidence that show that these rulings were relevant. So far as the fourth request relates to the duty which the defendants owed the plaintiff, in view of the fact known to them that he was a dealer, and that the instrument would be

offered for sale, it was dealt with in the instructions actually given. While some of the instructions requested were given, others not excepted to were given, which we must therefore hold to have been appropriate to the case.

The jury was further instructed, by which instruction the plaintiff deems himself to have been aggrieved, "that in the absence of any express warranty there was no implied warranty as to the quality of the piano, and the defendants were only bound to furnish an instrument which was merchantable and salable as a piano, and which might be sold at some price as a piano." All that the plaintiff had proved, so far as the facts are developed to us, was that the defendants, manufacturers, had contracted to sell him a piano, and had delivered the same with knowledge on their part from which it was fairly inferable by them that the plaintiff proposed to sell it again. The plaintiff had not shown that it was to be of any particular class or quality of instrument, and that there is great difference in these respects is a matter of common knowledge. Without undertaking to discuss the numerous cases on this subject, it has long been held in this commonwealth that, without express warranty or actual fraud, every person who sells goods of a certain denomination or description undertakes as a part of his contract that the thing delivered corresponds to the description, and is in fact an article of the species, kind, and quality expressed in the contract of sale. Winsor v. Lombard, 18 Pick. 57. When, therefore, one has stipulated for species and kind only in an article purchased, he is not entitled to remedy for any deficiency in quality, unless the species and kind stipulated for necessarily imply the affirmation that it has a certain quality inconsistent with the defects claimed. Even where the vendee might, with proper care, have discovered the real nature of the article by examination, he may rely on the affirmation of the vendor, who will still be liable if it varies in kind from the description given in his contract. Henshaw v. Robbins, 9 Metc. 83; Mixer v. Coburn, 11 Metc. 559.

Strictly speaking, a warranty is an express or implied statement of something which the party undertakes shall be a part of the contract; and yet, though a part of the contract, is collateral to the express object of it. Chanter v. Hopkins, 4 Mees. & W. 399; Mansfield v. Trigg, 113 Mass. 350-355. But selling an article by a particular description is often called a warranty

in the cases on this subject; and the failure in any respect to furnish the article described, a breach of warranty. Where one sells an article for a particular purpose, and undertakes that it shall be sufficient for the purpose, it is a breach of his contract if it is not so.

The case does not materially differ when, having full knowledge of the purpose of the purchaser, that purpose is adopted as the basis of the contract, either by express language or in any other way. But, unless the vendor undertakes in some form that the article shall be sufficient for the purpose, he is not responsible, even if he knew the purpose for which the purchaser intends to use it. A purchaser may certainly buy that which is not fit for his purpose, as rope which is not heavy enough for the rigging of his ship or to draw his seine, without any responsibility on the part of the vendor by reason of its insufficiency. By undertaking to comply with the order of the plaintiff, who was a dealer, for a piano, the instructions held that the defendants were bound to furnish him one which was merchantable and salable. It inferred from the position of the parties that the piano was to be sold again, and required of the defendants one that was adapted for that purpose. If the plaintiff was desirous of one of any particular quality in tone, workmanship, or other characteristic of such instruments, he should have included these in the description which his order gave.

In the case at bar the order was not for an instrument of any described class or quality, but for a piano simply. Nor is it easy to perceive that, by reason of the fact that the defendants were manufacturers, they should have been held to any higher degree of responsibility than that required by the instructions. Whether the defect which was discovered after the instrument had been in the defendant's rooms a short time—that of the "checking" of the piano case—was occasioned by inferior workmanship or not, the jury might have found that it was a merchantable and salable article. No question, however, was presented by the request as to the extent to which defendants were responsible for inferior workmanship. The defendants were not bound to manufacture or to furnish more than a merchantable article under the contract as made.

Exceptions overruled.

Warranty of Fitness for Particular Purpose.

RANDALL v. NEWSON.

2 Q. B. Div. 102 (Eng.). 1877.

At the trial before Archibald, J., at the Middlesex Hilary sittings, 1876, it appeared that the plaintiff bought of the defendant, who was a carriage-builder, a phaeton, in August, 1874; it was only fitted with shafts for one horse, and the plaintiff gave orders to the defendant for a pole and splinter-bar to be made and fitted to it.

The phaeton was sent home with the pole and splinter-bar, and while the plaintiff was driving it with two horses in October, 1875, the horses swerved and the pole broke short off at the carriage. The horses in consequence became restive and were much damaged.

There was much contradictory evidence as to the cause of the breaking of the pole, the plaintiff's witnesses saying it was of bad wood, while the defendant's stated that the wood was perfectly good. The value of a new pole was agreed at £3, and the plaintiff gave evidence that his horses were damaged to between £130 and £140. The learned judge expressed it as his opinion, that if there were no negligence on the part of the defendant in making the pole, or in the selection of the materials, the plaintiff could not recover more than the £3; and he left to the jury two questions: 1. Was the pole reasonably fit and proper for the carriage? 2. Was the defendant guilty of any negligence? And he asked the jury also to assess the consequential damages, in case they should become material. The learned judge was obliged to leave the court to attend a meeting of the judges, before the jury had returned their verdict.

The jury answered both questions in the negative, and as to the damages, said they understood from the judge that £3 was all they could find. * * *

The plaintiff obtained an order for a new trial on the ground of misdirection by the learned judge as to the measure of damages.

BRETT, J. A. This case was tried upon the footing that it was an action brought against the defendant, a coachbuilder,

to recover damages in respect of injuries to the plaintiff's horses and carriage, by reason of the defendant having supplied to the plaintiff a defective carriage pole. The jury found that the pole was not reasonably fit and proper for the use of the carriage; but that there was no negligence on the part of the defendant (including, of course, his servants or agents) in supplying the pole. The price of a new pole was £3. The damage done to the horses and carriage was much more. But the only damages found by the jury were £3. Upon these findings the Court of Queen's Bench, applying to this contract the principle laid down in Readhead v. Midland Ry. Co., Law Rep. 2 Q. B. 412; in error 4 Q. B. 379, gave judgment for the defendant. No dispute was made at the trial, or in argument, as to the nature of the order given and accepted; the questions argued were whether the defendant was liable at all, and what was the extent of damages to which he might be subjected, if he was liable at all. Now as to these questions, it is to be taken, although nothing specific seems to have been said, that the order given and accepted was not merely for a pole in general, but for the supply of a pole for the plaintiff's carriage; and that the contract therefore was for the purchase and sale, or supply, of an article for a specific purpose. In other words, the subject-matter of the contract was not merely a pole, but a pole for the purchaser's carriage; or, to state the proposition in an equivalent form, the thing which would, if the contract were formally drawn up, be described in it as the subject-matter of it, would not be merely a pole generally, but a pole to be purchased for a specific purpose, namely, to be used in the plaintiff's carriage. The question is, what, in such a contract, is the implied undertaking of the seller as to the efficiency of the pole? Is it an absolute warranty that the pole shall be reasonably fit for the purpose, or is it only partially to that effect, limited to defects which might be discovered by care and skill?

In order to decide this question it seems advisable to ascertain the primary or governing principle on which the earlier cases were decided, and to see whether the principle on which they were decided ought to be modified by the decision in Readhead v. Midland Ry. Co., supra. * * * In Gray v. Cox, 4 B. & C. 108, 115, in 1825, the case was decided on a variance; but Abbott, C. J., stated that he was of opinion, "that if a person

sold a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose." The commodity ordered was copper for sheathing the ship "Coventry." It was proved that no defect could be discovered by inspection of the article, and it was admitted that the defendants were ignorant of the defective quality of the copper. It is obvious that Lord Tenterden did not consider the seller relieved by reason of the defect being latent.

This ruling of Lord Tenterden was adopted in the decision of Jones v. Bright, 5 Bing. 533, 540, in 1829. The contract was for copper sheathing for a ship. The question proposed by Ludlow, Sergt., in argument was, "whether the law will, according to the dictum of Lord Tenterden, in Gray v. Cox, supra, lay upon the seller or manufacturer an obligation to warrant in all cases that the article which he sells shall be reasonably fit and proper for the purpose for which it is intended, and render him responsible for all the consequences which may result, if it shall be found not to answer the purpose for which it was designed, and that, on account of some latent defect of which he was ignorant, and which shall not be proved to have arisen from any want of skill on his part, or the use of improper materials, or any accident against which human prudence might have been capable of guarding him." Here, therefore, the whole proposition, with and without limitations, was plainly laid before the judges for their consideration.

The answer given by Best, C. J., was: "I wish to put the case on a broad principle. If a man sells an article he thereby warrants that it is merchantable,—that it is fit for some purpose. If he sells it for that particular purpose, he thereby warrants it fit for that purpose. * * * Whether or not an article has been sold for a particular purpose is, indeed, a question of fact; but if sold for such purpose, the sale is an undertaking that it is fit. * * * The law then resolves itself into this,—that if a man sells generally, he undertakes that the article sold is fit for some purpose; if he sells it for a particular purpose, he undertakes that it shall be fit for that particular purpose." Nothing can be more clear than that the rule is advisedly enunciated as a warranty without limitation. Brown v. Edgington, 2 M. & G. 279, is to the same effect.

I have cited these cases, and the principles laid down in them,

in order clearly to ascertain what is the primary or ultimate rule from which the rules which have been applied to contracts of purchase and sale of somewhat different kinds have been deduced. Those different rules, as applied to such different contracts, are carefully enumerated and recognized in Jones v. Just, Law Rep. 3 Q. B. 197. In some contracts the undertaking of the seller is said to be only that the article shall be merchantable; in others, that it shall be reasonably fit for the purpose to which it is to be applied. In all, it seems to us, it is either assumed or expressly stated, that the fundamental undertaking is, that the article offered or delivered shall answer the description of it contained in the contract. That rule comprises all the others; they are adaptations of it to particular kinds of contracts of purchase and sale. You must, therefore, first determine from the words used, or the circumstances, what, in or according to the contract, is the real mercantile or business description of the thing which is the subject-matter of the bargain of purchase or sale, or, in other words, the contract. If that subject-matter be merely the commercial article or commodity, the undertaking is, that the thing offered or delivered shall answer that description, that is to say, shall be that article or commodity, salable or merchantable. If the subject-matter be an article or commodity to be used for a particular purpose, the thing offered or delivered must answer that description, that is to say, it must be that article or commodity, and reasonably fit for the particular purpose. The governing principle, therefore, is that the thing offered and delivered under a contract of purchase and sale must answer the description of it which is contained in words in the contract, or which would be so contained if the contract were accurately drawn out. And if that be the governing principle, there is no place in it for the suggested limitation. If the article or commodity offered or delivered does not in fact answer the description of it in the contract, it does not do so more or less because the defect in it is patent, or latent, or discoverable. And accordingly there is no suggestion of any such limitation in any of the judgments in cases relating to contracts of purchase and sale. Unless, therefore, there is some binding authority to the contrary, we ought not now to introduce by implication a limitation into contracts of purchase and sale which has never been introduced before. * * * We

think that the judgment of the Court of Queen's Bench should be reversed, and that the order should be for a new trial generally, if the plaintiff elects to have a new trial at all. If he does not, the verdict and judgment for the plaintiff for £3 will stand.

The plaintiff has succeeded on the appeal, and should therefore have the costs of the appeal. * * *

Judgment reversed.

Known, Described, and Definite Article.

SEITZ v. BREWERS' REFRIGERATING, ETC., CO.

141 U. S. 510, 12 Sup. Ct. R. 46. 1891.

[Seitz ordered from the Brewers' Refrigerating Co. a No. 2 size refrigerating machine as manufactured by it, which the seller was to set up and start in operation in Seitz's brewery. A machine of the kind ordered was furnished and installed by the Brewers' Refrigerating Co., but it did not keep the rooms at the temperature necessary for the purpose of brewing beer. Seitz had asked for an express warranty that the machine would keep the rooms at the desired temperature, but this the Company had refused to give. In an action brought by the Brewers' Refrigerating Company against Seitz for the price of the machine, Seitz set up as a defense that there was an implied warranty that the machine would be fit for the purpose for which the seller knew that it was intended, and that there was a breach of this warranty in that the machine was entirely unfit for the buyer's purpose. A verdict was given for the Brewers' Refrigerating Company. Seitz appeals.]

FULLER, C. J. * * * Plaintiff in error contends that there was an implied warranty, arising from the nature of the transaction, that the machine should be reasonably fit to accomplish certain results, to effect which he insists the purchase was made. It is argued that the evidence tended to establish that the plaintiff knew that the defendant had been cooling his brewery with ice, and that the object of obtaining the machine was to render unnecessary the expense of purchasing ice for that purpose, and that unless the machine would cool it to the same extent, or about the same, as the ice did, it would be worthless,

so far as he was concerned. It is not denied that the machine was constructed for refrigerating purposes, and that it worked and operated as a refrigerating machine should; but it is said that it did not so refrigerate as to reduce the temperature of the brewery to 40° Fahrenheit, or to a temperature which would enable defendant to dispense with the purchase of ice. The rule invoked is that where a manufacturer contracts to supply an article which he manufactures, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment of the manufacturer, the law implies a promise or undertaking on his part that the article so manufactured and sold by him for a specific purpose, and to be used in a particular way, is reasonably fit and proper for the purpose for which he professes to make, and for which it is known to be required; but it is also the rule, as expressed in the text-books and sustained by authority, that where a known, described, and definite article is ordered of a manufacturer, although it is stated by the purchaser to be required for a particular purpose, still, if the known, described, and definite thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. * * *

In the case at bar the machine purchased was specifically designated in the contract, and the machine so designated was delivered, put up, and put in operation in the brewery. The only implication in regard to it was that it would perform the work the described machine was made to do, and it is not contended that there was any failure in such performance. This is not the case of an alleged defect in the process of manufacture known to the vendor, but not to the purchaser, nor of presumptive and justifiable reliance by the buyer on the judgment of the vendor rather than his own, but of a purchase of a specific article, manufactured for a particular use, and fit, proper, and efficacious for that use, but in respect to the operation of which, in producing a desired result under particular circumstances, the buyer found himself disappointed. In short, there was no express warranty that the machine would cool 150,000 cubic feet of atmosphere to 40° Fahrenheit, or any other temperature, without reference to the construction of the particular brewery or other surrounding circumstances, and, if there were no actual warranty, none could be imputed. We may add that, in the

light of all the evidence in the record, treated as competent, we think no verdict could be permitted to stand which proceeded upon the ground of the existence of such a warranty as is contended for. The alleged antecedent representations as to whether the machine possessed sufficient refrigerating power to cool this brewery, were no more than expressions of opinion, confessedly honestly entertained, and dependent upon other elements than the machine itself, concerning which plaintiff in error could form an opinion as well as defendant; and the conduct of plaintiff in error in demanding, two days after the contract was executed, a written guaranty that the machine company would cool his building to 3½ Reaumur (or 40° Fahrenheit), and keep it at that all the time, and in acquiescing in the company's refusal to give the guaranty for reasons stated, and in thereupon afterwards ordering the company to go on with the work, as exhibited in the correspondence between the parties, seems to us to justify no other conclusion than that reached by the verdict.

The judgment of the circuit court is affirmed.

CHAPTER XVII.

EXPRESS WARRANTIES.

What Constitutes a Warranty.

CHAPMAN v. MURCH.

19 Johns. 290. 1822.

[Action to recover for breach of an express warranty of soundness of a horse traded by the defendant to the plaintiff which he represented to be sound. The horse was not sound, but had the disease called yellow water from which he died the day after the trade was made. Defendant claimed that he had not warranted, and that the representations made by him could not be treated as an express warranty.]

SPENCER, C. S., delivered the opinion of the court. In the various cases which have been cited, it appears, abundantly, that when the action is founded on a warranty of the soundness of a chattel sold, a warranty must be proved; but it nowhere appears, that it is necessary that the vendor should use the express words, that he warranted the soundness. If a man should say, on the sale of a horse, "I promise you the horse is sound," it is difficult to conceive that this is not a warranty, and an express one too. Peake (on Evid. 28) says: "In an action on a warranty, the plaintiff must prove the sale and warranty." "In general," he says, "any representation made by the defendant of the state of the thing sold, at the time of the sale, will amount to the warranty." He adds, "But where the defendant refers to any document, or to his belief only, in such cases no action is maintainable, without proof, that he knew he was representing a falsehood." In every action on a warranty, it must be shown that there was an express and direct affirmation of the quality and condition of the thing sold, as contradistinguished from opinion, etc., and when that is made out, it would be an anomaly to require that the word warrant should be used. Any words

of equivalent import, showing the intention of the parties, that there should be a warranty, will suffice. In the present case, the plaintiff offered to prove what, under the circumstances, might be an express warranty; and that was for the consideration of the jury, under the advice of the court. Seixas v. Woods, 2 Caines 56; Pasley v. Freeman, 3 Term Rep. 57; Cramer v. Bradshaw, 10 Johns. Rep. 484.

Judgment reversed.

WOLCOTT, JOHNSON & CO. v. LEWIS D. MOUNT.

7 Vroom 262 (N. J.). 1873.

The cause was argued in this court on the following statement of the case:

On trial of the appeal, Mount, the appellee and plaintiff before the justice, proved that Wolcott, Johnson & Co. were merchants keeping a store of general merchandise, in the county of Monmouth, and that, among other articles, they advertised and kept agricultural seeds for sale, and sold seeds. Mount went to their store and asked one of the partners, Bloomfield Wolcott, for early strap-leaf red-top turnip seed, and Wolcott showed him, and sold to him, seed which Wolcott told him was early strap-leaf red-top turnip seed, and sold it to Mount (two pounds) as such, and Mount paid him * * * cents for the same. Mount sowed the same on * * * acres of his ground, which he had prepared with care and great expense for the purpose. Mount had been in the habit, year after year, to sow early strap-leaf red-top turnip seed, to produce turnips for the early New York market, such kind and description of turnips yielding a large profit, and he, at time of purchase, stated that he wished this description and kind of seed for that purpose.

The seed sold to Mount by Wolcott was sown upon the ground prepared for the same by Mount, and the turnips produced therefrom were not early strap-leaf red-top turnips, but turnips of a different kind and description, to wit, Russia, late, and not salable in market, and only fit for cattle, and he lost his entire crop. The plaintiff proved that the seed sold him by Wolcott was not early strap-leaf red-top turnip seed, but seed of a different kind and description, to wit, Russia turnip seed, and that

it produced no profit to him, and that early strap-leaf red-top turnip seed on same ground in other years had produced large profits to Mount, and on adjoining ground, prepared in same way, the same year, had produced great profits to the owner, and that Mount was damaged thereby.

It is agreed that Wolcott did not know that the seed he sold Mount was not early strap-leaf red-top turnip seed, and that he did not sell the seed to him fraudulently, the said Wolcott having purchased the seed for early strap-leaf red-top turnip seed. It is also agreed that this kind of turnip seed cannot be known and distinguished, by the examination through sight or touch, from Russia or other kinds, but only by the kind of turnips it produces after sowing, can it be known.

The Court of Common Pleas gave judgment for the plaintiff below for $99.12 damages.

DEPUE, J. The action in this case was brought on a contract of warranty and resulted in a judgment against the defendants in the action for damages.

Two exceptions to the proceedings are presented by the brief submitted. The first touches the right of the plaintiff to recover at all. The second the measure of damages.

In the absence of fraud or a warranty of the quality of an article, the maxim, caveat emptor, applies. As a general rule, no warranty of the goodness of an article will be implied on a contract of sale. * * * But in a number of instances it has been held that statements descriptive of the subject-matter, if intended as a substantive part of the contract, will be regarded in the first instance as conditions, on the failure of which the other party may repudiate in toto, by a refusal to accept or a return of the article, if that be practicable, or if part of the consideration has been received, and rescission therefor has become impossible, such representations change their character as conditions and become warranties, for the breach of which an action will lie to recover damages.

The right to repudiate the purchase for the non-conformity of the article delivered, to the description under which it was sold, is universally conceded. That right is founded on the engagement of the vendor, by such description, that the article delivered shall correspond with the description. The obligation

rests upon the contract. Substantially, the description is warranted. It will comport with sound legal principles to treat such engagements as conditions in order to afford the purchaser a more enlarged remedy, by rescission, than he would have on a simple warranty; but when his situation has been changed, and the remedy, by repudiation, has become impossible, no reason supported by principle can be adduced, why he should not have upon his contract such redress as is practicable under the circumstances. In that situation of affairs, the only available means of redress is by an action for damages. Whether the action shall be technically considered an action on a warranty, or an action for the non-performance of a contract, is entirely immaterial.

The contract which arises from the description of an article on a sale by a dealer not being the manufacturer, is not in all respects co-extensive with that which is sometimes implied, where the vendor is the manufacturer, and the goods are ordered by a particular description, or for a specified purpose, without opportunity for inspection, in which case, a warranty, under some circumstances, is implied that the goods shall be merchantable, or reasonably fit for the purpose for which they were ordered. In general, the only contract which arises on the sale of an article by a description, by its known designation in the market, is that it is of the kind specified. If the article corresponds with that description, no warranty is implied that it shall answer the particular purpose in view of which the purchase is made. * * * Nor can any distinction be maintained between statements of this character in written and in oral contracts. The arguments founded on an apprehension that where the contract is oral, loose expressions of judgment or opinion pending the negotiations, might be regarded as embodied in the contract, contrary to the intentions of parties, is without reasonable foundation. It is always a question of construction or of fact, whether such statements were the expression of a mere matter of opinion, or were intended to be a substantive part of the contract, when concluded. If the contract is in writing, the question is one of construction for the court. Behn v. Burness, 3 B. & S. 751. If it be concluded by parol, it will be for the determination of the jury, from the nature of the sale, and the circumstances of each particular case, whether the language used was an expression

of opinion, merely leaving the buyer to exercise his own judgment, or whether it was intended and understood to be an undertaking which was a contract on the part of the seller. Lomi v. Tucker, 4 C. & P. 15; De Sewhanberg v. Buchanan, 5 C. & P. 343; Power v. Barham, 4 A. & E. 473. In the case last cited, the vendor sold by a bill of parcels, "four pictures, views in Venice—Canaletto;" it was held that it was for the jury to say, under all the circumstances, what was the effect of the words, and whether they implied a warranty of genuineness, or conveyed only a description or an expression of opinion, and that the bill of parcels was properly laid before the jury with the rest of the evidence.

The purchaser may contract for a specific article, as well as for a particular quality, and if the seller makes such a contract, he is bound by it. The state of the case presented shows that the plaintiff inquired for seed of a designated kind, and informed the defendants that he wanted it to raise a crop for the New York market. The defendants showed him the seed, and told him it was the kind he inquired for, and sold it to him as such. The inspection and examination of the seed were of no service to the plaintiff. The facts and circumstances attending the transaction were before the court below, and from the evidence, it decided that the proof was sufficient to establish a contract of warranty. The evidence tended to support that conclusion, and this court cannot, on certiorari, review the finding of the court below, on a question of fact, where there is evidence from which the conclusion arrived at may be lawfully inferred.

Obvious Defects.

WATSON v. ROODE.

30 Neb. 264, 46 N. W. 491. 1890.

NORVAL, J. This action was commenced by Orange A. Roode to recover damages for an alleged breach of warranty given by Joseph Watson on the sale by him to Roode of a stallion. The amended petition alleges "that on the 18th day of November, 1884, the defendant, as an inducement to plaintiff to purchase from him a certain imported black stallion, called 'Knight of the Shires,' for the sum of $2,000, warranted the

said horse to be a foal getter, and sound in every respect, except an enlargement of said horse's bag, which was caused by a kick, and represented the said horse as being then and there sound; that the title to the same was clear, and that the said horse was registered in the Stud Book of England, as well as his sire and dam, and would furnish the secretary's receipt for such pedigree; and plaintiff, relying upon said warranty and statements, purchased said horse from the defendant for the sum of $2,000, then duly paid. Plaintiff avers that said horse at the time of said sale, was unsound in this: that the enlargement of said horse's bag was hernia at the time of said sale, and in no way was he free from difficulty or trouble, and was of no value whatever; that one testicle of said horse was mashed and completely ruined, and was of no benefit to the said horse; and on account of said hernia, mashed testicle, and urethral gleet, all of which the said horse had at the time of the purchase, combined to cause the death of said horse, to wit, on the 16th day of June, 1886. Plaintiff avers that the pedigree of said horse was not as warranted by the defendant, and that the said defendant never has furnished the secretary's receipt for such pedigree, as agreed to have been done on the part of the defendant. Plaintiff avers that said horse was not a good foal getter. And by reason of above premises plaintiff has sustained damages in the sum of $5,000." The answer of the defendant admits the sale of the horse to the plaintiff, and denies all the other allegations of the amended petition. On the trial of the case to a jury, a verdict was returned for the plaintiff, assessing his damages at $1,476.50. * * * The plaintiff upon the trial offered in evidence the following instrument:—

Diller, Neb., November, 1884.

In consideration of $2,000, receipt whereof is hereby acknowledged, I have this day sold my imported black English draft-horse, "Knight of the Shires," to O. A. Roode, and hereby agree to warrant and defend the title to said horse from all claims whatsoever, and I also guaranty said horse to be a foal getter, and I further state that the enlargement of said horse's bag was caused by a kick, and in no way troubles him, and I further guaranty the said horse to be registered in the Stud Book of England; also his dam, as well as his sire, and will furnish the secretary's receipt for such pedigree. It is further agreed that

if said O. A. Roode is unable to pay a note bearing even date with this agreement from the proceeds of the first year's services of said horse, he shall have the privilege of another year's time on $200. Joseph Watson.

* * * The defendant insists that the defect in the horse was plain and noticeable at the time of the sale; that it was of such a character as to require the plaintiff to take notice of its extent and effect; and, that the injury being plain and visible to the buyer, the warranty did not cover such defect. It is true that the evidence discloses that the blemish on the horse was apparent, and was observed by the plaintiff prior to the sale, yet it was impossible for him to tell whether the defect was of such a character as to injure the horse as a foal getter. The defendant, by his contract warranted against this hidden imperfection, and he cannot escape liability because the injury was one that left an external blemish plainly visible.

While a general warranty does not usually extend to imperfections known to both parties, yet it is equally well settled that the seller may bind himself, as against patent defects, if the warranty is so worded. Pinney v. Andrus, 41 Vt. 631; Bank v. Grindstaff, 45 Ind. 158. The contract of warranty in the case at bar expressly stipulates that "the enlargement of the horse's bag in no way troubled him," and is a guaranty against the extent of the injury. The defendant having by his contract expressly warranted against the defects of the horse, he cannot relieve himself from liability by showing that the plaintiff was aware at the time of the sale that the horse was injured.

It was admitted by the defendant on the trial that the horse was not registered in the Stud Book of England. That the horse was warranted to be so registered is not denied. The defendant on the trial sought to escape the force and effect of this clause of his written warranty by attempting to show that, at the time of the sale, he informed the plaintiff that the horse was not registered. Upon cross-examination of the plaintiff, Roode, he was asked by the defendant's counsel this question: "At the time the writing was made [being the warranty in question], I will ask you to state to the jury whether or not Watson didn't tell you that the horse was not registered in the Stud Book of England." The plaintiff's objection to the witness answering the question was sustained, and the answer was not taken. This

ruling of the court is now assigned as error. The testimony sought to be elicited, had it been received, would have contradicted and varied the written agreement of the parties. It is too well established to require the citation of authorities that parol testimony cannot be received to contradict or vary a written contract. It is claimed by the defendant that the purpose of this testimony was to show that the defendant had knowledge that the horse was not registered, and that the defendant could not have relied upon the statement in the warranty that the horse was registered, and therefore no claim for damages can be based upon the fact that the horse was unregistered.

While it is true that in a suit on a breach of warranty against defects in the article sold the seller may prove that the defects were of such a character that the purchaser must have known of their existence, or that the buyer knew of them prior to the sale, for the purpose of showing that the plaintiff did not rely upon the warranty, yet it does not follow that it is competent to prove that the seller, during the negotiations leading up to the sale, made representations to the purchaser directly contradictory to his written warranty subsequently made. No case has been cited by counsel for plaintiff in error holding the doctrine contended for by him in this case, nor have we been able to find such a case reported in the books. To permit such testimony to be received would violate the familiar rule of evidence above referred to. There was therefore no error in sustaining the plaintiff's objection to the question propounded. * * *

The sixth and ninth instructions, refused, stated in substance that defects or blemishes which are known to the purchaser must be expressly warranted against to make the seller liable for such defects. We find no fault with the statement of the law in these instructions. The plaintiff did not seek to recover for defects that were visible at the time of the purchase, and that were not expressly covered by the terms of the warranty. The plaintiff claimed damages because the horse was unregistered, and on account of the injury which the horse had received prior to the sale. Both of these matters were expressly covered by the warranty.

The eleventh request covers the question of reliance by the purchaser upon the warranty. It is as follows: "(11) The court further instructs the jury, to entitle the plaintiff to recover

in the suit, it is not only necessary for the jury to find from the evidence that the plaintiff warranted the animal in question as alleged in the petition, but it must further appear from the evidence that the plaintiff relied upon said warranty in making the purchase of the horse, and was induced to make said purchase by said warranty, and it must also appear from the evidence that the horse was not as warranted at the time of the sale; and, unless all of these facts appear from the evidence, the jury should find for the defendant." The law undoubtedly is, and has been so declared by this court, that the purchaser of personal property must have relied upon the statements of the seller as to the quality of the article sold, in order to make the representations a warranty. Little v. Woodworth, 8 Neb. 281; Halliday v. Briggs, 15 Neb. 219. This instruction stated the law correctly, and, not being covered by any of the instructions given, should not have been refused. For the errors pointed out, the judgment of the district court is reversed, and the cause remanded for further proceedings.

Sale by Sample.

BRADFORD v. MANLY.

13 Mass. 139. 1816.

Assumpsit, * * * to recover the difference in value between two casks of cloves, alleged to be sold by sample, to the plaintiff, and the cloves actually delivered by virtue of the sale. At the trial, * * * the plaintiff produced a bill of parcels of six hundred and two pounds of cloves at one dollar fifty cents per pound, on which payment was acknowledged by the defendant. * * * He then produced a witness who testified that on the 4th of January, 1814, the defendant came to the plaintiff's store, with a sample of cloves in a paper, and asked the plaintiff if he wished to purchase some cloves. The witness examined the sample, and found the cloves to be of the best quality of Cayenne cloves. * * *

It was in evidence that the sample was not taken from the casks sold, but from an open barrel, out of which those casks had been filled. * * * The casks were not opened until May, 1815, when * * * they were opened, and were found to contain a mixture of Cayenne cloves and an inferior and

distinct species of the same article. * * * Before instituting this suit, and after the defect was discovered, the plaintiff offered to return the cloves, but the offer was not accepted. * * * The jury returned a verdict for the plaintiff, having found the facts specially as above stated and having also found that there was no fraud in the sale on the part of the defendant.

* * * * * * * * * * *

PARKER, C. J. * * * We may then come to the principal question, viz., whether the evidence in the cause proved a contract to sell cloves of a different kind from those which were delivered. The defendant exhibited a sample, by which the plaintiff purchased. Among fair dealers there could be no question but the vendor intended to represent that the article sold was like the sample exhibited; and it would be to be lamented, if the law should refuse its aid to the party who had been deceived in a purchase so made.

The objection is, that no action upon a warranty can be maintained, unless the warranty is express; and that no other action can be maintained, unless there be a false affirmation respecting the quality of the article. If such were the law, it would very much embarrass the operations of trade, which are frequently carried on to a large amount by samples of the articles bought and sold. * * *

The fair import of the exhibition of a sample is, that the article proposed to be sold is like that which is shown as a parcel of the article. It is intended to save the purchaser the trouble of examining the whole quantity. It certainly means as much as this, "The thing I offer to sell is of the same kind, and essentially of the same quality, as the specimen I give you." I do not know that it would be going too far to say that it amounts to a declaration, that it is equally sound and good. But it is not necessary to go so far in the present case, and we are not disposed to question the correctness of the decision in Parkinson v. Lee.

It is expressly found by the jury in the case at bar that the cloves delivered were different in kind from those which composed the sample, and inferior in value; not from decay or exposure, but that there is a specific difference in the respective plants from which they are produced. Surely, if a man were to

exhibit to me a parcel of Hyson tea as a sample, to induce me to buy a chest, and I should pay him the price of Hyson, and he should deliver me a chest of Bohea or Souchong, I might recover the difference in value, if he should refuse to do me justice, although he did not expressly warrant that the tea in the chest was the same as that in the sample. Indeed the exhibition of a sample must, in all fair dealing, stand in lieu of a warranty or affirmation. It is a silent, symbolical warranty, perfectly understood by the parties, and adopted and used for the convenience of trade.

The cases must be very strong to establish a principle so unjust, and so productive of distrust and jealousy among traders, as that contended for by the defendant's counsel. For what purpose is the sample exhibited, unless it is intended as a representative of the thing to be sold? What would an honorable merchant say if, when he took from a mass of sugar or coffee a small parcel, and offered to sell by it, the man who was dealing with him should ask him if it was a fair sample, and call upon him to warrant it so? Mercantile honor would instantly take the alarm, and if such questions should become necessary, there would be no need of that honor which happily is now general and almost universally relied upon. That there is not an unknown and invisible defect, owing to natural causes, or to previous management by some former dealer, he may not be presumed to affirm when he shows the sample, and as to these particulars an express warranty may be required, consistently with confidence in the fair dealing of the vendor. But that the thing is the same, generically and specifically, as that which he shows for it, he certainly undertakes, and if a different thing is delivered, he does not perform his contract, and must pay the difference, or receive the thing back and rescind the bargain, if it is offered him.

A case similar to this in principle came up before me two or three years ago, at nisi prius. An advertisement appeared in the papers, which was published by a very respectable mercantile house, offering for sale good Caraccas cocoa. The plaintiff made a purchase of a considerable quantity, and shipped it to Spain, having examined it at the store before he purchased; but he did not know the difference between Caraccas and other cocoa. In the market to which he shipped it there was a con-

siderable difference in value in favor of the Caraccas. It was proved that the cocoa was of the growth of some other place, and that it was not worth so much in that market. I held that the advertisement was equal to an express warranty, and the jury gave damages accordingly. The defendants had eminent counsel, and they thought of saving the question; but afterwards abandoned it, and suffered judgment to go. Surely, if a sample of Caraccas cocoa had been shown to the purchaser and any other cocoa had been delivered to him, the case would not have been less strong.

We are all decidedly of the opinion, that a sale by sample is tantamount to an express warranty that the sample is a true representative of the kind. There must, therefore, be entered judgment according to the verdict.

CHAPTER XVIII.

REMEDIES FOR BREACH OF WARRANTY.

Acceptance of Goods as Affecting Damages.

UNDERWOOD v. WOLF.

131 Illinois 425, 23 N. E. 598. 1890.

MAGRUDER, J., delivered the opinion of the court:—

The contract bears date Feb. 8, 1886. By its terms the appellee was to furnish and erect the refrigerating machinery with engine, pump, pipes, etc., in the packing-house of the appellants, and have the same in complete working order by the 8th day of May, 1886. The evidence tends to show that the whole plant was not ready for use until the 1st day of July, 1886. * * *

But the main controversy between the parties arises upon the following provision in the contract: "And it is further agreed * * * that if the machines have fulfilled the guaranties made for them in this agreement by 1st of September, 1886, then said party of the second part [appellants] shall accept the same; and all payments to be made after the payment to be made on July 1, 1886, shall be promissory notes, dated on the day of acceptance of the plant with interest after maturity." The defendants refused to give and have never given the notes thus provided for.

What are the guaranties which were to be fulfilled? The plaintiff, Wolf, agreed and guaranteed, that the machine would maintain certain degrees of cooling temperature in certain rooms in the packing-house, and would cool the rooms within a certain specified time; that it would cool a certain number of hogs of a specified weight within a specified time; that the power required to drive the machinery should not exceed a certain limit; that the fuel required to produce the steam to do the work of the engines should not exceed a certain amount; that the loss of ammonia in doing the work should not exceed a certain number of pounds; that the refrigerating machines should be of the best material and workmanship; that the engine should be ca-

pable of running the packing-house machinery in addition to the compressors; that the iron piping to be furnished should be such as would be necessary to carry and convey the brine required for the proper cooling of the rooms.

In considering the nature of these guaranties, it is unnecessary to discuss any nice distinctions between warranties on the one side, and conditions precedent or descriptions of the property on the other. It is sufficient that the guaranties are treated as warranties, and their non-fulfillment, if they were not fulfilled, will be regarded as a breach of warranty.

Inasmuch as the plant was to be completed by May 8, 1886, and was to be accepted if the guaranties were fulfilled by September 1, 1886, it is manifest that the period between these two dates was to be made use of for the purpose of testing the machines, in order to ascertain whether or not they were such as they were guaranteed to be. It is also sufficiently manifest that, if the machines failed in any of the particulars named in the guaranties, the defects which would thus be shown to exist must be regarded as patent defects as contradistinguished from latent defects.

Where there is a sale and delivery of personal property in præsenti with express warranty, and the property turns out to be defective, the vendee may receive and use the property and sue for damages on a breach of the warranty, or, when sued for the purchase price, he may recoup such damages under the general issue, or set them up in a special plea of set-off. This is a well-settled rule. In the present case the contract is executory; the title to the property did not vest in the purchaser until the period for making the test had passed. It has been held in some States that, where the contract is thus executory and a time is fixed for making a test, the acceptance and use of the property, after such time has passed, amount to a waiver of the right to claim damages for a breach of the warranty. But such is not the law in this State. In the present case, the evidence tends to show that the defendants took possession about July 1, 1886, of the machines, placed in their packing-house by the plaintiff, and had been using the same up to the time of the trial of the cause in the court below. The chief complaint of the appellants is that, under the instructions given by the trial court, the jury were led to regard the acceptance and use of the machinery by the

defendants as an abandonment of all right to damages for breach of the warranties. We are unable to regard this complaint as well founded.

We agree with the counsel for appellants, in the main, in their view of the law. We think that, even where the contract is executory, the claim for damages on account of a breach of the warranty will survive the acceptance of the property. Chitty on Contracts (11th ed.) at page 652 says: "Where, therefore, the vendor of a warranted article, whether it be a specific chattel or not, sues for the price or value, it is competent to the purchaser, in all cases, to prove the breach of the warranty in reduction of damages, and the sum to be recovered for the price of the article will be reduced by so much as the article was diminished in value by non-compliance with the warranty." The previous discussion of the authorities by the author, before arriving at the conclusion thus announced, shows his meaning to be, that the breach of the warranty may be proven in reduction of damages, not only in the case of the sale of a specific chattel, but also in the case of an executory contract, as, for example, "where an article is ordered from a manufacturer who contracts that it shall be of a certain quality, or fit for a certain purpose." Idem, pages 647 to 652.

In Bejamin on Sales, vol. 2, § 1356 (4th Am. ed.), it is said: "The buyer will also lose his right of returning goods delivered to him under a warranty of quality, if he has shown by his conduct an acceptance of them, or if he has retained them a longer time than was reasonable for a trial, or has consumed more than was necessary for testing them, or has exercised acts of ownership as by offering to resell them; all of which acts show an agreement to accept the goods, but do not constitute an abandonment of his remedy by cross-action or by counter-claim in the vendor's action for the price." If the retention of the property by the buyer for a longer time than is reasonable for a trial does not waive his right to damages in an action by the vendor for the purchase price, then there is no reason why his retention of the property for a longer time than that fixed in the contract for a trial should amount to such waiver.

The rule, as announced by these text writers, has been held to be the law in this State. * * *

We are, therefore, of the opinion that the defendants had a

right, in the case at bar, to offset, against plaintiff's claim for the contract price of the machines, such damages as they were able to show that they had sustained from a failure to fulfill the guaranties, if there was such failure.

The subject presents itself under two aspects: first, were the machines such as they were warranted to be in the contract? second, if they were not such as they were warranted to be, was there such an acceptance of them as would preclude the defendants from insisting upon damages for the breach?

The case seems to have been tried mainly upon the theory suggested by the first question. The plaintiff introduced proof to show that the machines did fulfill the guaranties, while the defendants produced evidence to show that they did not fulfill the guaranties. In other words, the question most prominently presented to the minds of the jury was, not whether there had been a waiver of existing defects, but whether or not any defects actually existed. Upon the latter subject they were most fully and elaborately instructed by the court. The court gave nine or ten instructions asked by the defendants, authorizing the jury to give them damages for the breach of the warranties if the jury should find from the evidence that the machines did not fulfill the guaranties. These instructions all adopt and express the theory of the law contended for by the counsel for appellants. They announce over and over again, that the defendants were entitled to damages if the machines were not what they were warranted to be as to cooling capacity for rooms and hogs, as to amount of power and fuel and piping, etc., and as to every other particular specified in the contract. The jury by their verdict and the Appellate Court by their judgment of affirmance have found the fact to be that the defendants had not suffered the damages claimed by them. Hence, such fact is settled beyond our power to change it. * * *

Where the contract for the sale of the goods is an executory one, and the time for examination, whether fixed by the contract or allowed by the law, has passed, the buyer may refuse to accept the goods and may return them, or he may accept them and sue for breach of warranty, or rely upon the damages for such breach in reduction of the contract price. Benjamin on Sales, 4th Am. ed., vol. 2, §§ 1346, 1347, 1348, etc.; Doane v. Dunham, supra; Owens v. Sturges, supra; Mears v. Nichols, supra. If he

desires to rescind the contract and return the goods, he must offer them back as soon as he discovers the breach, or after he has had a reasonable time for examination; such right to rescind and return is waived by retaining and continuing to use the goods longer than is necessary for a trial of them.

There is some evidence tending to show that Viles, one of the defendants, requested the plaintiff to remove the machine. Such request if made would indicate an intention on the part of the defendants not to accept the machine, but to rescind the contract. Hence, no harm was done by giving the plaintiff's eighth instruction. That instruction merely told the jury that the right of the buyer to reject the article sold to him, or, in other words, his right to return it and rescind the contract, might be waived or lost by acts inconsistent with the ownership of the vendor or by the continued use of the article after knowledge of the defects. But the impression was in no way conveyed to the minds of the jury that, if defendants elected to accept the machine and not to return it, their right to offset damages for breach of warranty against the contract price would be waived by such acts and such continued use as are specified in the instruction. Waiver of the right to return the machine is one thing; waiver of the right to claim damages is another and entirely different thing. The third instruction given for the defendants expressly told the jury that "the defendants were not bound to return the said machines and apparatus, if found not to be according to the warranty, but might keep the same, and, when sued for the price, set up such warranty and the breach thereof as a defense, and, if proven, be allowed the amount of damages they have sustained by reason of the breach of the warranty."

It is also to be observed that the word "acceptance," as used in reference to the subject-matter of this controversy, has two significations. Where goods are sold under an executory contract, there may be an acceptance of them in full discharge of the contract, or there may be an acceptance of them in such sense that the buyer retains and uses them and becomes vested with the title and ownership of them, but reserves the right to claim damages for their defects. This distinction is recognized in Estep v. Fenton, supra, and in Mears v. Nichols, supra. It is also recognized in the fourth instruction given for the defendants in this case, which told the jury that "the defendants

are not prevented from setting off the damages they may have sustained by reason of the performance of the contract in a manner different from the agreement merely because they may have done acts amounting to an acceptance of the machine. They could only be prevented from setting off such damages so sustained in case they had accepted the machine in full discharge of the contract." So, also, the seventh instruction given for the plaintiff contains these words: "If the jury shall believe from the evidence that, prior to the bringing of this suit, defendants did accept said machine in full discharge of the contract, then the jury are instructed that defendants are not entitled to set off or recover in this action any damages resulting to them, if any, by reason of plaintiff's failing to meet the guaranties made by him in said contract." Under these and other instructions that were given, the jury could not have been led to believe, that the right of the defendants to claim damages for breach of the warranties was cut off or waived by any other kind of acceptance than an acceptance in full discharge of the contract. * * *

Judgment affirmed.

CHAPTER XIX.

THE STATUTE OF FRAUDS.

Contract for Sale: Massachusetts Rule.

GODDARD v. BINNEY.

115 Mass. 450. 1874.

Contract to recover the price of a buggy built by the plaintiff for the defendant.

Trial in the Superior Court, before Dewey, J., who reported the case for the consideration of this court in substance as follows:

The plaintiff, a carriage manufacturer in Boston, testified that the defendant came to his place of business in April, 1872, and directed the plaintiff to make for him a buggy, and the plaintiff entered the order in his order-book; the defendant gave directions that the color of the lining should be drab, and the outside seat of cane, and as to the painting, and also that the buggy was to have on it his monogram and initials. The sum of $675 was agreed as the price. It was to be done in or about four months. The plaintiff immediately began work upon the buggy and made every part, it being painted, lined, and with the initials, as ordered.

The last of August, when the buggy was nearly completed, wanting only the last coat of varnish, and the hanging of it on the wheels, the defendant came to the plaintiff's place of business and asked when it would be done. The plaintiff replied in about ten days, and asked the defendant if he might sell the buggy, or if he wished it, as he, the plaintiff, had opportunities of selling it to others. The defendant then inquired if the plaintiff could furnish him another if he sold that, to which he replied he could not, as he was going to give up the business of manufacturing, and that unless he took this he could not have any. The defendant then said he would keep this one.

The defendant did not at this, nor at any other time, see the

buggy. The buggy was finished September 15, in accordance with the original order. It is usual to keep carriages some time after they are finished to let the paint and varnish harden.

October 14, 1872, the plaintiff sent to the defendant the following bill: "Boston, October 14, 1872. Mr. H. P. Binney. Bo't of Thos. Goddard, one new cane seat buggy, $675. Rec'd Pay't. (Buggy was finished Sept. 15.)"

The bill was presented by a clerk of the plaintiff. The defendant, after looking at it, said he would see the plaintiff soon. The bill was in the plaintiff's handwriting and was kept by the defendant. The same clerk called again soon after and asked the defendant for a check, to which he replied that he would pay it soon, and would see the plaintiff. Calling a third time, before the fire of November 9th, the defendant said, "Tell Mr. Goddard I will come and see him right away." By the fire of November 9, 1872, this buggy and all the property on the plaintiff's premises were destroyed. After the fire the plaintiff again called on the defendant for payment. He wanted to know if it was insured, and said he would see the plaintiff about it.

After the buggy was finished, it was kept with the completed work on the plaintiff's premises; and it was at all times after it was finished till burned worth and could have been sold by the plaintiff for upwards of $700, the value of buggies of the plaintiff's manufacture having advanced after the contract was made in April.

AMES, J. Whether an agreement like that described in this report should be considered as a contract for the sale of goods, within the meaning of the Statute of Frauds, or a contract for labor, service, and materials, and therefore not within that statute, is a question upon which there is a conflict of authority. According to a long course of decisions in New York, and in some other States of the Union, an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered (such as flour from wheat not yet ground, or nails to be made from iron in the vendor's hands), is not a contract of sale within the meaning of the statute. Crookshank v. Burrell, 18 Johns. 58; Sewall v. Fitch, 8 Cow. 215; Robertson v. Vaughn, 5 Sandf. 1; Downs v. Ross, 23 Wend. 270; Eichelberger v. M'Cauley, 5 Har. & J. 213.

In England, on the other hand, the tendency of the recent decisions is to treat all contracts of such a kind intended to result in a sale, as substantially contracts for the sale of chattels; and the decision in Lee v. Griffin, 1 B. & S. 272, goes so far as to hold that a contract to make and fit a set of artificial teeth for a patient is essentially a contract for the sale of goods, and therefore is subject to the provisions of the statute. See Maberley v. Sheppard, 10 Bing. 99; Howe v. Palmer, 3 B. & Ald. 321; Baldey v. Parker, 2 B. & C. 37; Atkinson v. Bell, 8 B. & C. 277.

In this Commonwealth, a rule avoiding both of these extremes was established in Mixer v. Howarth, 21 Pick. 205, and has been recognized and affirmed in repeated decisions of more recent date. The effect of these decisions we understand to be this, namely, that a contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But, on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute. Spencer v. Cone, 1 Met. 283. "The distinction," says Chief Justice Shaw, in Lamb v. Crafts, 12 Met. 353, "we believe is now well understood. When a person stipulates for the future sale of articles, which he is habitually making, and which, at the time, are not made or finished, it is essentially a contract of sale, and not a contract for labor; otherwise, when the article is made pursuant to the agreement." In Gardner v. Joy, 9 Met. 177, a contract to buy a certain number of boxes of candles at a fixed rate per pound, which the vendor said he would manufacture and deliver in about three months, was held to be a contract of sale and within the statute. To the same general effect are Waterman v. Meigs, 4 Cush. 497, and Clark v. Nichols, 107 Mass. 547. It is true that in "the infinitely various shades of different contracts," there is some practical difficulty in disposing of the questions that arise under that section of the statute. Gen. Sts. c. 105, § 5. But we see no ground for holding that there is any uncertainty in the rule itself. On the contrary, its correctness and justice are clearly implied or expressly affirmed in all of our decisions upon the subject matter. It is proper to say also that the present case is a much stronger one

than Mixer v. Howarth. In this case the carriage was not only built for the defendant, but in conformity in some respects with his directions, and at his request was marked with his initials. It was neither intended nor adapted for the general market. As we are by no means prepared to overrule the decision in that case, we must therefore hold that the statute of frauds does not apply to the contract which the plaintiff is seeking to enforce in this action.

Independently of that statute, and in cases to which it does not apply, it is well settled that as between the immediate parties property in personal chattels may pass by bargain and sale, without actual delivery. If the parties have agreed upon the specific thing that is sold and the price that the buyer is to pay for it, and nothing remains to be done but that the buyer should pay the price and take the same thing, the property passes to the buyer, and with it the risk of loss by fire or any other accident. The appropriation of the chattel to the buyer is equivalent for that purpose to delivery by the seller. The assent of the buyer to take the specific chattel is equivalent for the same purpose to his acceptance of possession. Dixon v. Yates, 5 B. & Ad. 313, 340. The property may well be in the buyer, though the right of possession, or lien for the price, is in the seller. There could in fact be no such lien without a change of ownership. No man can be said to have a lien, in the proper sense of the term, upon his own property, and the seller's lien can only be upon the buyer's property. It has often been decided that assumpsit for the price of goods bargained and sold can be maintained where the goods have been selected by the buyer, and set apart for him by the seller, though not actually delivered to him, and where nothing remains to be done except that the buyer should pay the agreed price. In such a state of things the property vests in him, and with it the risk of any accident that may happen to the goods in the meantime. Noy's Maxims, 89; 2 Kent, Com. (12th ed.) 492; Bloxam v. Sanders, 4 B. & C. 941; Tarling v. Baxter, 6 B. & C. 360; Hinde v. Whitehouse, 7 East 571; Macomber v. Parker, 13 Pick. 175, 183; Morse v. Sherman, 106 Mass. 430.

In the present case nothing remained to be done on the part of the plaintiff. The price had been agreed upon; the specific chattel had been finished according to order, set apart and appropriated for the defendant, and marked with his initials. The

plaintiff had not undertaken to deliver it elsewhere than on his own premises. He gave notice that it was finished, and presented his bill to the defendant, who promised to pay it soon. He had previously requested that the carriage should not be sold, a request which substantially is equivalent to asking the plaintiff to keep it for him when finished. Without contending that these circumstances amount to a delivery and acceptance within the statute of frauds, the plaintiff may well claim that enough has been done, in a case not within that statute, to vest the general ownership in the defendant, and to cast upon him the risk of loss by fire while the chattel remained in the plaintiff's possession.

According to the terms of the reservation, the verdict must be set aside, and judgment entered for the plaintiff.

Goods, Wares, Merchandise—Growing Trees.

HIRTH v. GRAHAM.

50 Ohio St. 57, 33 N. E. 90. 1893.

BRADBURY, J. The plaintiff in error brought an action before a justice of the peace to recover of the defendant in error damages alleged to have been sustained on account of the refusal of the latter to perform a contract by which he had sold to the plaintiff in error certain growing timber. The defendant attempted to secure the dismissal of the action, on the ground that the justice had no jurisdiction of an action for the breach of such a contract. Failing in this, and the action being tried to a jury, he requested the justice to instruct the jury "that if they find from the evidence that the trees about which this action is brought were at the time of said alleged contract then growing upon the land of defendant, and that no note or contract or memorandum of the contract of sale was at the time made in writing, the plaintiff cannot maintain this action, and your verdict should be for the defendant;" which instruction the justice refused to give. The court, however, not only refused to give the instructions requested by the defendant, but told the jury in substance that no written memorandum was necessary.

Whether a sale of growing trees is the sale of an interest in or concerning land has long been a much controverted subject in the courts of England, as well as in the courts of the several States

of the Union. The question has been differently decided in different jurisdictions, and by different courts, or at different times by the same court within the same jurisdiction. The courts of England, particularly, have varied widely in their holdings on the subject. Lord Mansfield held that the sale of a crop of growing turnips was within this clause of the statute. Emmerson v. Heelis, 2 Taunt. 38, following the case of Waddington v. Bristow, 2 Bos. & P. 452, where the sale of a crop of growing hops was adjudged not to have been a sale of goods and chattels merely. And in Crosby v. Wadsworth, 6 East 602, the sale of growing grass was held to be a contract for the sale of an interest in or concerning land, Lord Ellenborough saying: "Upon the first of these questions [whether this purchase of the growing crop be a contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them], I think that the agreement stated, conferring, as it professes to do, an exclusive right to the vesture of the land during a limited time and for given purposes, is a contract or sale of an interest in, or at least an interest concerning, lands." Id. 610. Afterwards, in Teal v. Auty, 2 Brod. & B. 99, the Court of Common Pleas held a contract for the sale of growing poles was a sale of an interest in or concerning lands. Many decisions have been announced by the English courts since the cases above noted were decided, the tendency of which have been to greatly narrow the application of the fourth section of the Statute of Frauds to crops, or timber, growing upon land. Crops planted and raised annually by the hand of man are practically withdrawn from its operation, while the sale of other crops, and in some instances growing timber also, are withdrawn from the statute, where, in the contemplation of the contracting parties, the subject of the contract is to be treated as a chattel. The latest declaration of the English courts upon this question is that of the Common Pleas Division of the High Court of Justice, in Marshall v. Green, 1 C. P. Div. 35, decided in 1875. The syllabus reads: "A sale of growing timber to be taken away as soon as possible by the purchaser is not a contract or sale of land, or any interest therein, within the fourth section of the Statute of Frauds." This decision was rendered by the three justices who constituted the Common Pleas Division of the High Court of Justice,—Coleridge, C. J., Brett and Grove, JJ.,—whose characters and attainments entitle it to great weight; yet, in view

of the prior long period of unsettled professional and judicial opinion in England upon the question, that the court was not one of final resort, and that the decision has encountered adverse criticism from high authority (Benj. Sales [ed. 1892], § 126), it cannot be considered as finally settling the law of England on this subject. The conflict among the American cases on the subject cannot be wholly reconciled. In Massachusetts, Maine, Maryland, Kentucky, and Connecticut, sales of growing trees, to be presently cut and removed by the vendee, are held not to be within the operation of the fourth section of the Statute of Frauds. * * * In none of these cases, except 4 Metc. (Ky.) 373, and in 13 B. Mon. 340, had the vendor attempted to repudiate the contract before the vendee had entered upon its execution; and the statement of facts in those two cases do not speak clearly upon this point. In the leading English case before cited (Marshall v. Green, 1 C. P. Div. 35), the vendee had also entered upon the work of felling the trees, and had sold some of their tops before the vendor countermanded the sale. These cases, therefore, cannot be regarded as directly holding that a vendee, by parol, of growing timber to be presently felled and removed, may not repudiate the contract before anything is done under it; and this was the situation in which the parties to the case now under consideration stood when the contract was repudiated. Indeed, a late case in Massachusetts, Giles v. Simonds, 15 Gray 441, holds that "the owner of land, who has made a verbal contract for the sale of standing wood to be cut and severed from the freehold by the purchaser, may at any time revoke the license which he thereby gives to the purchaser to enter his land to cut and carry away the wood, so far as it relates to any wood not cut at the time of the revocation." The courts of most of the American States, however, that have considered the question, hold expressly that a sale of growing or standing timber is a contract concerning an interest in lands, and within the fourth section of the Statute of Frauds. * * * The question is now, for the first time, before this court for determination; and we are at liberty to adopt that rule on the subject most conformable to sound reason. In all its other relations to the affairs of men, growing timber is regarded as an integral part of the land upon which it stands; it is not subject to levy and sale upon execution as chattel property; it descends

with the land to the heir, and passes to the vendee with the soil. Jones v. Timmons, 21 Ohio St. 596. Coal, petroleum, building stone, and many other substances constituting integral parts of the land, have become articles of commerce, and easily detached and removed, and, when detached and removed, become personal property, as well as fallen timber; but no case is found in which it is suggested that sales of such substances, with a view to their immediate removal, would not be within the statute. Sales of growing timber are as likely to become the subjects of fraud and perjury as are the other integral parts of the land; and the question whether such sale is a sale of an interest in or concerning lands should depend not upon the intention of the parties, but upon the legal character of the subject of the contract, which, in the case of growing timber, is that of realty. This rule has the additional merit of being clear, simple, and of easy application, —qualities entitled to substantial weight in choosing between conflicting principles. Whether circumstances of part performance might require a modification of this rule is not before the court, and has not been considered.

Judgment affirmed.

The Writing Required.

WATERMAN v. MEIGS.

4 Cush. 497 (Mass.). 1849.

[By an oral agreement the plaintiff contracted to sell to the defendant five thousand feet of plank at $127.50 per thousand. At the trial in the lower court the plaintiff offered evidence of this oral agreement.] The plaintiff then gave in evidence a letter addressed to him, dated May 18, 1848, and signed by the defendant Meigs alone, of which the following is a copy. "Sir, having been expecting for some time the plank I bought of you when at Norwich, and not receiving, or hearing from them or you, I take the trouble to write you respecting them, as we shall be ready to use them in all next week; please write immediately, and let me know if you can deliver them by the middle of next week. Do not delay an answer one moment, as we shall positively want them and have to quit, unless they come to hand next

week. Send me the plank I bought, a good lot (extra as the price). Yours, in haste."

The defendants contended, on this evidence, that there was no sufficient memorandum, or note in writing, of the contract relied on by the plaintiff, to take it out of the operation of the Statute of Frauds (Rev. Sts., c. 74, par. 4); and the judge being of the opinion, that as there was no evidence of any acceptance or reception of the plank, or of any part of it, by the defendants, or of anything being given in earnest, or in part payment, and that the letter offered by the plaintiff was not such a note or memorandum in writing as would take the case out of the operation of the Statute, instructed the jury that on this evidence the plaintiff could not recover.

The jury thereupon returned a verdict for the defendants, and the plaintiff alleged exceptions.

By the Court. The question, whether a contract is a contract to sell, or to make and deliver, is often a very difficult one to determine. See Lamb v. Crafts, 12 Met. 353, 356, and cases there cited. But the agreement in this case was clearly a contract to sell, within the Statute. Such being the nature of the contract, is the paper relied on a sufficient memorandum to take the case out of the Statute? No objection is made to its being signed by only one partner, it being a partnership concern. The Statute requires "some note or memorandum in writing of the bargain." This letter alludes to plank bought, and to be delivered; but it does not state any one of the elements of a contract, price, quantity, quality, time, place, or anything to inform us what the nature of the contract was; and is clearly not a sufficient memorandum. The case of Morton v. Dean, 13 Met. 385, in which the memorandum relied on was held not to be sufficient, was a stronger case for the plaintiffs than the present.

Exceptions overruled.

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Prepared by F. W. SCHENK
Librarian, Law School, University of Chicago.

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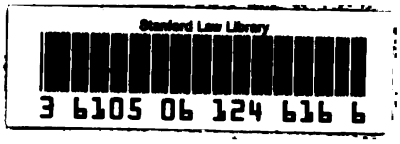

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